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COURT OF APPEALS CASES

ROMERO v BURT MOEKE HARDWOODS, INC

Docket No. 271122. Submitted November 15, 2007, at Detroit. Decided July 29, 2008, at 9:00 a.m. Leave to appeal sought.

Pablo Gutierrez Romero, an employee of Burt Moeke Hardwoods, Inc. (Hardwoods), was injured in a work-related accident in Michigan while training to be a millwright. Romero, a Mexican citizen, had been recruited in Mexico by Hardwoods with the intention that following the training he would return to Mexico to work in a sawmill that Hardwoods intended to open in Mexico. Hardwoods had assisted Romero in obtaining a work visa for such purposes. Romero was unable to continue his training as a result of the injury and, when his visa eventually expired, he returned to Mexico and took lower-paying employment in the electronics field, but he was unable to keep working because of pain and swelling associated with his injury. A workers' compensation magistrate awarded Romero benefits, and Hardwoods and its insurer, Accident Fund Insurance Company of America, appealed to the Workers' Compensation Appellate Commission (WCAC), which affirmed the award of benefits. The Court of Appeals, SAAD, P.J., and CAVANAGH and DONOFRIO, JJ., denied the defendants' application for leave to appeal in an unpublished order, entered February 13, 2006 (Docket No. 264909). The defendants sought leave to appeal in the Supreme Court and the Supreme Court, in lieu of granting leave, remanded the matter to the Court of Appeals for consideration as on leave granted. 475 Mich 883 (2006).

The Court of Appeals *held*:

1. The magistrate and the WCAC did not err in holding that Romero is disabled under MCL 418.301(4) and in determining that the injury reduced his "maximum" reasonable wage-earning ability in work suitable to his qualifications and training. The magistrate and the WCAC were not required to consider the "universe of jobs" suitable to Romero's qualifications and training, only those that produce the maximum income.

2. Romero proved that his wage loss is attributable to his work-related injury, not the expiration of his visa.

3. Romero has not attempted to avoid an offer of reasonable employment in bad faith.

4. The record supports the determination of the WCAC that Romero left the United States because his visa had expired.

5. The award of specific-loss benefits for the loss of usefulness of his leg was supported by competent evidence and must be affirmed.

Affirmed.

1. WORKERS' COMPENSATION — WORDS AND PHRASES — DISABILITY.

The Worker's Disability Compensation Act defines "disability" as a limitation of an employee's wage-earning capacity in work suitable to his or her qualifications and training from a personal injury or work-related disease; an employee is disabled if he or she suffers an injury that results in a reduction of that person's maximum reasonable wage-earning ability in work suitable to that person's qualifications and training (MCL 418.301[4]).

2. WORKERS' COMPENSATION — ALIENS.

Aliens in the United States who work in the service of another under any contract of hire are employees under the Worker's Disability Compensation Act and are eligible for benefits where they establish a work-related disability that has resulted in wage loss (MCL 418.161[1][*l*], 418.301[4]).

Reamon Fotieo Szczytko & House (by *Themis J. Fotieo*) and *Evans, Portenga & Slater* (by *John A. Braden*) for the plaintiff.

Lacey & Jones (by *Gerald M. Marcinkoski*) for the defendants.

Before: SAAD, P.J., and JANSEN and BECKERING, JJ.

BECKERING, J. This matter is before us on remand from the Supreme Court for consideration as on leave granted. Defendants appeal a decision of the Workers' Compensation Appellate Commission (WCAC) affirming the magistrate's decision to award plaintiff benefits. We affirm.

Otis Fahl, a representative of defendant Burt Moeke Hardwoods, Inc. (Hardwoods), recruited plaintiff Pablo

Gutierrez Romero, a Mexican citizen, to train as a millwright in the United States. Fahl informed plaintiff that following the training, Hardwoods would employ plaintiff in a sawmill the company intended to open in Mexico. After recruiting plaintiff, Hardwoods assisted him in obtaining a work visa and he began training as a millwright in the United States. During training, a forklift crushed plaintiff's right leg, necessitating surgery and several months of hospital recuperation. As a result of the injury, plaintiff was unable to complete millwright training. Hardwoods continued to employ plaintiff and obtained limited extensions of his visa, but the visa eventually expired. Plaintiff subsequently returned to Mexico and obtained employment working on electronics. But, because of pain and swelling associated with his leg injury, plaintiff was unable to keep working. Plaintiff cannot stand for more than an hour, squat, or climb a ladder without severe pain. He walks with a significant limp and falls down on occasion.

After plaintiff successfully petitioned for workers' compensation benefits, defendants appealed to the WCAC. The WCAC affirmed the award. Defendants then sought leave to appeal in this Court. We denied defendants' application for leave to appeal. *Romero v Burt Moeke Hardwoods Inc*, unpublished order of the Court of Appeals, entered February 13, 2006 (Docket No. 264909). On application for leave to appeal in the Supreme Court, the matter was remanded to this Court for consideration as on leave granted. *Romero v Burt Moeke Hardwoods, Inc*, 475 Mich 883 (2006).

When this Court reviews a decision of the WCAC, it does not begin by considering the magistrate's decision, but looks first to the decision of the WCAC. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709; 614 NW2d 607 (2000). The WCAC is charged with ensuring

that the findings of fact in a workers' compensation case are supported by the requisite evidence. *Id*. at 730. It must determine whether the magistrate's decision is supported by competent, material, and substantial evidence by reviewing the entire record and performing a qualitative and quantitative analysis of all the evidence presented. *Id*. at 699; MCL 418.861a(4), (13). The WCAC is authorized by MCL 418.861a(14) to "make independent findings of fact, regarding issues that have been addressed or overlooked by the magistrate, as long as the record is sufficient for administrative review and does not prevent the WCAC from reasonably exercising its reviewing function without resort to speculation." *Mudel, supra* at 730.

If any evidence supports the WCAC's factual findings and if the WCAC did not misapprehend its administrative appellate role in reviewing the magistrate's decision, then this Court must treat the WCAC's factual findings as conclusive. *Id*. at 709-710. As our Supreme Court expressed in *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992):

> If it appears on judicial appellate review that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, did not "misapprehend or grossly misapply" the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate, the judicial tendency should be to deny leave to appeal or, if it is granted, to affirm, in recognition that the Legislature provided for administrative appellate review by the seven-member WCAC of decisions of thirty magistrates, and bestowed on the WCAC final fact-finding responsibility subject to constitutionally limited judicial review.

This Court reviews de novo of questions of law involved with any final order of the WCAC. MCL 418.861a(14); *DiBenedetto v West Shore Hosp*, 461 Mich

394, 401; 605 NW2d 300 (2000). The WCAC's decision may be reversed if it operated within the wrong legal framework or based its decision on erroneous legal reasoning. *Id*. at 401-402.

I

Defendants first argue that the WCAC misapplied *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), by engaging in a "reasonable employment" analysis under MCL 418.301(5) without first making a proper determination regarding disability under MCL 418.301(4). According to defendants, in finding that plaintiff suffered a "disability" as defined in MCL 418.301(4), the WCAC failed to consider "the universe of jobs" suitable to plaintiff's qualifications and training as required by *Sington*, *supra*. We disagree.

A claimant in a workers' compensation matter must establish a work-related disability and entitlement to benefits by a preponderance of the evidence. MCL 418.851; *Aquilina v Gen Motors Corp*, 403 Mich 206, 211; 267 NW2d 923 (1978). MCL 418.301(4) defines "disability" as "a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease." In *Sington*, *supra* at 155, our Supreme Court found that the plain language of this provision "indicates that a person suffers a disability if an injury covered under the WDCA [Worker's Disability Compensation Act] results in a reduction of that person's maximum reasonable wage earning ability in work suitable to that person's qualifications and training." Thus, if because of a work-related injury an employee can no longer perform one specific job that pays the maximum salary in light of the employee's qualifications and training, but the employee can per-

form an equally well-paying job that is suitable to his or her qualifications and training, the employee is not disabled. *Id*.

The *Sington* Court instructed that in determining whether an employee is disabled under MCL 418.301(4), the magistrate and the WCAC "should consider whether the [work-related] injury has actually resulted in a loss of wage earning capacity in work suitable to the employee's training and qualifications in the ordinary job market." *Id*. at 158. In making this determination, the magistrate and the WCAC may inquire into "the particular work that an employee is both trained and qualified to perform, whether there continues to be a substantial job market for such work, and the wages typically earned for such employment in comparison to the employee's wage at the time of the work-related injury." *Id*. at 157. The Court further noted that "the focus of the inquiry is not on every single job suitable to an employee's qualifications and training—only those that produce the maximum income." *Id*. at 160. An employee is disabled if he or she "is no longer able to perform any of the jobs that pay the maximum wages, given the employee's training and qualifications . . . ." *Id*. at 157.[1]

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[1] Our Supreme Court recently held that in order to establish a prima facie case of disability under *Sington*, *supra*, the employee must show more than an inability to perform a previous job. *Stokes v Chrysler LLC*, 481 Mich 266, 281; 750 NW2d 129 (2008). Rather, the employee must prove a work-related injury and that the injury caused a reduction of his or her maximum wage-earning capacity in work suitable to his or her qualifications and training. *Id*. The *Stokes* Court held that to establish the latter element, the employee must complete four steps: (1) the employee must fully disclose his or her qualifications and training; (2) the employee must consider other jobs that pay his or her maximum preinjury wage to which the employee's qualifications and training translate; (3) the employee must show that his or her work-related injury prevents him or her from performing some or all of the jobs identified as

In this case, we cannot conclude that the magistrate and the WCAC erred in determining plaintiff disabled under MCL 418.301(4). The magistrate and the WCAC properly applied *Sington*, *supra*, in reaching this conclusion and their factual findings were supported by the record. Plaintiff presented evidence that he was trained and qualified to work on electronics and that he was training to be a millwright at the time of his injury. During millwright training, plaintiff earned the highest wage he had ever earned. But, because of his injury, plaintiff was unable to complete the training. It is undisputed that plaintiff is now unable to work as a millwright. After plaintiff's injury, Hardwoods continued to give him "odd jobs." Hardwoods paid plaintiff the same hourly wage that he earned during millwright training, but he worked fewer hours. Upon returning to Mexico, plaintiff obtained employment working on electronics, earning substantially less than he made during millwright training. Because of complications from his injury, however, plaintiff was unable to keep the job.

Considering the evidence presented by plaintiff that he earned his highest wage during millwright training and that he is only trained and qualified to perform lesser-paying work, the magistrate and the WCAC properly determined that plaintiff's injury reduced his "maximum reasonable wage earning ability" in work suitable to his qualifications and training. *Sington*, *supra* at 155. Contrary to defendants' argument on appeal, the magistrate and the WCAC need not consider the "universe of jobs" suitable to plaintiff's qualifications and training, only those that produce the maximum income. *Id*. at 160. To the extent that the WCAC

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within his or her qualifications and training that pay his or her maximum wages; and (4) if the employee is capable of performing some or all of the jobs identified, the employee must show that he or she cannot obtain any of those jobs. *Id*. at 281-283.

erred in stating that "a full *Sington* review is not appropriate in this case," any error in this regard was harmless because the evidence presented established that plaintiff is disabled under MCL 418.301(4).

II

Defendants next argue that the magistrate and the WCAC erred in awarding plaintiff wage-loss benefits because plaintiff has not demonstrated that his wage loss is attributable to his work-related injury. Defendants attribute plaintiff's wage loss to the expiration of the visa allowing him to work in the United States, not to his injury. We disagree.

Aliens in the United States who work in the service of another under any contract of hire are employees under the WDCA and are eligible for benefits. MCL 418.161(1)(*l*); *Sanchez v Eagle Alloy, Inc*, 254 Mich App 651, 661-663; 658 NW2d 510 (2003). In order to be entitled to wage-loss benefits under the WDCA, an employee must establish a work-related disability under MCL 418.301(4) and demonstrate that the disability resulted in a wage loss. *Sington*, *supra* at 160 n 11; *Haske v Transport Leasing, Inc*, 455 Mich 628, 642-643; 566 NW2d 896 (1997), overruled in part in *Sington*, *supra* at 146. In *Haske*, *supra* at 654, our Supreme Court stated that even if an employee establishes a disability, he or she must further prove wage loss because, pursuant to the second sentence of MCL 418.301(4), "[t]he establishment of disability does not create a presumption of wage loss." Additionally, the employee's unemployment or reduced wages must be causally linked to the work-related disability. *Id*. at 658. See also *Sweatt v Dep't of Corrections*, 468 Mich 172, 186; 661 NW2d 201 (2003) (opinion by MARKMAN, J.)

(stating that "there must be a linkage between the disabling work-related injury and the reduction in pay").

The portion of *Haske* requiring proof of wage loss and a causal connection between the disability and the wage loss was not overruled by *Sington*. In addressing the import of the second sentence of MCL 418.301(4), that "[t]he establishment of disability does not create a presumption of wage loss," the *Sington* Court stated, in part:

> [T]he second sentence [of MCL 418.301(4)] reflects an understanding that there may be circumstances in which an employee, despite suffering a work-related injury that reduces wage earning capacity, does not suffer wage loss. For example, an employee might suffer a serious work-related injury on the last day before the employee was scheduled to retire with a firm intention to never work again. In such a circumstance, the employee would have suffered a disability, i.e., a reduction in wage earning capacity, but no wage loss because, even if the injury had not occurred, the employee would not have earned any further wages. [*Sington*, *supra* at 160-161.]

Defendants characterize plaintiff as the functional equivalent of a retiree, asserting that plaintiff "can 'never work again' until he obtains another visa that would allow him to work again in this country. Like the retiree in *Sington*'s example, plaintiff has no wages to replace in the United States." But, this case is factually distinguishable from the illustration in *Sington*. In that illustration, the employee was injured just before retirement. *Id*. at 160. He had no intention of ever working again, and even in the absence of the injury he would not have earned further wages. *Id*. at 160-161. In this case, plaintiff was 21 years old when he was injured and was training for a future job as a millwright. Hardwoods was training plaintiff with the intent to employ

him as a millwright in Mexico. But, because of his injury, plaintiff is now unable to work as a millwright in the United States or Mexico. While defendants are correct that plaintiff cannot legally work in the United States without a valid visa, plaintiff could have earned wages as a millwright in Mexico had the injury not occurred. Therefore, contrary to defendants' assertion, there is a causal connection between plaintiff's work-related injury and wage loss.

The additional cases relied on by defendants, *Reinforced Earth Co v Workers' Compensation Appeal Bd (Astudillo)*, 570 Pa 464; 810 A2d 99 (2002), and *Cenvill Dev Corp v Candelo*, 478 So 2d 1168 (Fla App, 1985), are also distinguishable from this case. In those cases, the claimants were never legal aliens and their wage loss was attributable to their illegal-alien status. *Reinforced Earth*, *supra* at 467, 479; *Cenvill Dev*, *supra* at 1169-1170. In this case, plaintiff obtained a valid nonimmigrant work visa and then began training as a millwright in the United States. Hardwoods intended to open a sawmill in Mexico and employ plaintiff at that sawmill. After plaintiff's injury, Hardwoods continued to give him "odd jobs" and obtained limited extensions of his visa. But, the visa eventually expired and plaintiff returned to Mexico. As we previously explained, plaintiff could have worked as a millwright in Mexico had the injury not occurred. Therefore, plaintiff's wage loss is attributable to his work-related injury, not the expiration of his visa.

Defendants also argue that requiring them to pay wage-loss benefits to plaintiff, to whom they cannot offer reasonable employment because he can no longer work in the United States, constitutes a denial of equal protection. While defendants are correct that an employer has the right to mitigate with an offer of reason-

able employment under MCL 418.301(5), an employer's mitigation rights are not absolute. The employer's rights must be balanced with the employee's right to refuse employment for good and reasonable cause. MCL 418.301(5); *Pulver v Dundee Cement Co*, 445 Mich 68, 80-81; 515 NW2d 728 (1994); *Sell v Mitchell Corp of Owosso*, 241 Mich App 235, 251-252; 615 NW2d 748 (2000). Whether the employer has made a bona fide offer of reasonable employment and whether the employee reasonably refused are questions of fact decided case by case. *Pulver*, *supra* at 80-81; *Jones-Jennings v Hutzel Hosp (On Remand)*, 223 Mich App 94, 103; 565 NW2d 680 (1997). MCL 418.301(9) defines "reasonable employment" as "work that is within the employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety, and that is within a reasonable distance from that employee's residence." Further, there are many factors to consider in determining the reasonableness of an employee's refusal, including whether the employee has moved and the reasons for the move. *Pulver*, *supra* at 81. A bad-faith attempt to avoid reasonable employment by moving never constitutes good and reasonable cause. *Id*. at 81 n 12; *Jones-Jennings*, *supra* at 111.

Defendants contend that they have been deprived of their mitigation rights under MCL 418.301(5) because plaintiff cannot legally work in the United States. But, the cases on which defendants relied, *Del Taco v Workers Compensation Appeals Bd*, 79 Cal App 4th 1437; 94 Cal Rptr 2d 825 (2000), *Tarango v State Industrial Ins Sys*, 117 Nev 444; 25 P3d 175 (2001), and *Hoffman Plastic Compounds, Inc v Nat'l Labor Relations Bd*, 535 US 137; 122 S Ct 1275; 152 L Ed 2d 271 (2002), address equal-protection arguments in the context of illegal aliens, not aliens legally working in the United States at the time of their injuries. In this case, Hardwoods

employed plaintiff knowing that his visa was temporary. Plaintiff had a valid visa at the time of his injury and only returned to Mexico after attempts to renew his visa failed. It is undisputed that he can no longer legally live or work in the United States. Clearly, plaintiff has not attempted to avoid an offer of reasonable employment in bad faith. Furthermore, there is no evidence that Hardwoods has offered plaintiff employment that he is able to perform within a reasonable distance from his home in Mexico. Therefore, defendants' equal-protection argument must fail.

III

Next, defendants argue that because the magistrate failed to make a factual finding regarding the reason for plaintiff's return to Mexico, the WCAC erred in making its own finding. We disagree.

After plaintiff's injury, Fahl's daughter accused plaintiff of sexual misconduct. The police investigated the incident and issued a warrant for plaintiff's arrest. Defendants alleged that plaintiff fled to Mexico to avoid arrest, but plaintiff testified that he was unaware of the warrant and returned to Mexico because his visa had expired. On appeal to the WCAC, defendants argued that the magistrate erred in failing to determine the reason for plaintiff's return to Mexico. The WCAC noted that the magistrate presiding over plaintiff's case was no longer on the bench at the time of its review of that decision. After reviewing the record, the WCAC determined that plaintiff returned to Mexico not to avoid arrest, but because his visa had expired.

Contrary to defendants' assertion that the WCAC conducted improper review de novo in determining the reason for plaintiff's return to Mexico, MCL 418.861a(14) specifically contemplates that the WCAC

will make findings of fact. "As long as the WCAC is presented with a record that allows it to intelligently make its own factual findings, the Legislature has declared that the WCAC is free to do so." *Mudel*, *supra* at 711. Here, the WCAC found sufficient evidence on the record to make a finding and determined that plaintiff left the United States because his visa had expired. Because there is record evidence to support the WCAC's finding, we will not overturn it on appeal. *Id*. at 701, 709-710.

IV

Finally, defendants challenge the award of specific-loss benefits to plaintiff, asserting that the WCAC failed to review the magistrate's award of benefits under recent caselaw that clarifies the specific loss provisions. We find no error.

Pursuant to MCL 418.361(2)(k), an employee may collect benefits for 215 weeks for the specific loss of a leg. *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 241; 697 NW2d 130 (2005). The employee is entitled to compensation for a specific loss regardless of the effect on the employee's earning capacity. *Id*. at 245. In *Cain*, *supra*, our Supreme Court found that the term "loss" as used in MCL 418.361(2) "includes not only amputation but also loss of usefulness." *Cain, supra* at 257. The Court stated that in *Pipe v Leese Tool & Die Co*, 410 Mich 510, 527; 302 NW2d 526 (1981), it described this loss of usefulness as " 'loss of the industrial use . . . .' " *Cain*, *supra* at 256. But, "[t]he phrase 'loss of industrial use' does not appear anywhere in the specific loss provisions, and seems to have been intended as judicial shorthand to describe the condition of the injured member from the standpoint of its use in employment." *Id*. The *Cain* Court reiterated, however,

that specific loss may be determined "without reference to the plaintiff's earning capacity or ability to return to work." *Id*. at 257.

Here, the magistrate found that plaintiff suffered a loss of the industrial use of his leg and the WCAC affirmed this finding without explanation. The magistrate stated, in part:

> . . . Plaintiff sustained the loss of the industrial use of his right leg as a result of the injuries he sustained at [Hardwoods]. That finding is based upon Dr. [Michael J.] Forness' opinion that Plaintiff cannot perform significant physical activity with the right leg as a result of the injuries he sustained at [Hardwoods]. The photographs admitted into evidence at trial significantly demonstrate the deformities in the right leg. Dr. Forness testified that Plaintiff almost lost the leg because of the injury and he would be limited to sedentary activities with the leg and would not be able to use the leg in an industrial capacity. Therefore, Plaintiff is entitled to specific loss benefits because of the loss of industrial use of the right lower extremity.

Defendants argue that in affirming the magistrate's award of specific-loss benefits, the WCAC failed to apply the specific-loss standard articulated in *Cain*, *supra*. We disagree. Although the magistrate used the phrase "loss of industrial use" in awarding plaintiff benefits, there is no indication that the magistrate or the WCAC misunderstood or misapplied the specific-loss standard. As the *Cain* Court indicated, the reference to industrial use in *Pipe*, *supra*, "seems to have been intended as judicial shorthand" for describing the specific-loss requirement. *Cain*, *supra* at 256. *Cain* suggests that the phrase "loss of industrial use," although potentially misleading, can be equated with amputation or loss of usefulness. *Id*. at 256-257. Moreover, the magistrate's findings of fact, which the WCAC reviewed, were supported by compe-

tent evidence in the record pertaining to loss of usefulness and must be affirmed. *Mudel*, *supra* at 701, 709-710.

Affirmed.

ZAREMBA EQUIPMENT, INC v
HARCO NATIONAL INSURANCE COMPANY

Docket No. 274745. Submitted April 8, 2008, at Detroit. Decided July 31, 2008, at 9:00 a.m. Leave to appeal sought.

Zaremba Equipment, Inc., brought an action in the Otsego Circuit Court against Harco National Insurance Company and Patrick Musall, who was Harco's agent, after a fire destroyed the plaintiff's building and its contents. The complaint alleged negligence, fraud, innocent misrepresentation, breach of contract, promissory estoppel, and other claims, all related to the adequacy of the coverage provided in the insurance policy and representations that Musall made or failed to make concerning that coverage. The jury found for the plaintiff on all of its claims and awarded the damages the plaintiff requested. The court, Dennis F. Murphy, J., denied the defendants' motions for judgment notwithstanding the verdict and a new trial. The defendants appealed.

The Court of Appeals *held*:

1. An insurance agent whose principal is the insurance company generally owes no duty to advise a potential insured about any insurance coverage. An event that alters the nature of the relationship between the agent and the insured, however, may produce a special relationship and create a duty on the agent's part to advise the insured in some respect regarding insurance issues, including the adequacy of the coverage. A change in the agent-insured relationship occurs when (1) the agent misrepresents the nature or the extent of the coverage offered or provided, (2) the insured makes an ambiguous request that requires clarification, (3) the insured makes an inquiry that requires advice and the agent gives inaccurate advice, or (4) the agent assumes an additional duty by an express agreement with or a promise to the insured.

2. The trial court erred by refusing to instruct the jury, as the defendants requested, that the plaintiff had a duty to read the insurance policy. MCL 600.2957(1) and MCL 600.6304 required the trial court to give this instruction concerning comparative negligence: An insured must read the insurance policy. While the jury found that Musall and the plaintiff shared a special relationship, that finding alone does not eliminate any claim of compara-

tive fault associated with or arising from the plaintiff's duty to read the policy and related documents. The negligence of one party does not eliminate the legal requirement that an opposing party use ordinary care, and a reasonable jury could have concluded that the plaintiff's failure to read the policy would qualify as comparative negligence. Because three negligence theories raised by the plaintiff were submitted to the jury, and a comparative-negligence analysis applied to only some of those theories, the entire negligence verdict must be reversed because it is impossible to determine which liability theories the jury adopted.

3. An insurance agent owes a duty to procure the insurance coverage requested by an insured. An agent owes no duty to procure coverage that would meet or exceed the insured's expectations, however, and on remand the trial court should not instruct the jury to that effect.

4. A party claiming fraud or innocent misrepresentation must prove reasonable reliance on the material misrepresentation. The jury had to decide whether the plaintiff's failure to read the policy constituted a proximate cause of the plaintiff's damages. The record could also have supported the plaintiff's claims related to reliance on Musall's representations about the accuracy of Musall's replacement-value calculations, matters on which reading the policy and related documents would have shed no light. A new trial is required.

5. The trial court erred by permitting the jury to consider the plaintiff's promissory-estoppel claim. The plaintiff failed to identify any promises that Musall made beyond those contained in the policy. Musall's alleged representations concerning full coverage or replacement-cost coverage were words of assurance or statements of belief, not promises. On retrial, a promissory-estoppel claim may not be submitted to the jury.

6. A court should determine the need for expert testimony in an insurance-coverage case on a case-by-case basis. The need for expert testimony depends on the nature of the underlying claims of negligence against the agent. If the duty allegedly breached falls beyond the average juror's understanding, the trial court may require the party alleging negligence to produce expert testimony supporting the claim. Whether Musall breached the duty of accurately representing the nature and extent of the insurance coverage, however, was a question of fact that the jury could answer on the basis of the jurors' common knowledge and ordinary experiences. An average juror could also decide whether Musall provided the plaintiff with clear and accurate advice regarding the replacement-value coverage or instead failed to advise the plaintiff that the coverage would not suffice to replace the building.

7. The plaintiff's use of letters that included references to ongoing settlement negotiations did not violate MRE 408, the rule that governs the admission of evidence concerning settlements. While evidence concerning settlements is generally inadmissible to prove liability for or the invalidity of the claim or its amount, the rule allows the evidence to be used for other purposes, including "negativing a contention of undue delay." Thus, evidence of settlement discussions may also be admitted to prove undue delay, which was an issue in this case and for which the plaintiff sought penalty interest under MCL 500.2006. Any error relating to the letters being hearsay was harmless.

8. The defendants failed to brief any legal challenges to the jury's awards for breach of contract, recovery of insurance premiums, and penalty interest and have thus abandoned those challenges.

Affirmed in part, reversed in part, vacated in part, and remanded for a new trial.

O'CONNELL, P.J., concurring in part and dissenting in part, concurred in all respects except the majority's determination that an expert witness was not required for the negligence claims. While the need for expert testimony must be determined on a case-by-case basis, it was necessary in this case. There were numerous significant questions related to the practices of insurance agents that involved matters of specialized knowledge and fell far outside a layperson's general knowledge.

1. INSURANCE — DUTIES OF INSURANCE AGENTS — NEGLIGENCE OF INSURANCE AGENTS — SPECIAL RELATIONSHIPS WITH INSURANCE AGENTS.

An insurance agent whose principal is the insurance company generally owes no duty to advise a potential insured about any insurance coverage, but an event that alters the nature of the relationship between the agent and the insured may produce a special relationship and create a duty to advise the insured in some respect regarding insurance issues, including the adequacy of the coverage; a change in the agent-insured relationship occurs when (1) the agent misrepresents the nature or the extent of the coverage offered or provided, (2) the insured makes an ambiguous request that requires clarification, (3) the insured makes an inquiry that requires advice and the agent gives inaccurate advice, or (4) the agent assumes an additional duty by an express agreement with or a promise to the insured.

2. INSURANCE — NEGLIGENCE — COMPARATIVE NEGLIGENCE — DUTY TO READ INSURANCE POLICIES.

The existence of a special relationship between an insurance agent and insured that creates a duty for the agent to advise the insured

regarding some insurance issue does not eliminate a claim of comparative negligence associated with or arising from the insured's duty to read the policy and related documents (MCL 600.2957[1], 600.6304).

3. EVIDENCE — EXPERT WITNESSES — INSURANCE-COVERAGE ISSUES.

The need for expert testimony in a negligence case involving issues of insurance coverage depends on the nature of the underlying claim against the insurance agent, and the trial court should determine the need on a case-by-case basis; expert testimony might be necessary if the duty allegedly breached falls beyond the average juror's understanding (MRE 702).

4. EVIDENCE — ADMISSIBILITY OF EVIDENCE — COMPROMISE AND SETTLEMENT — SETTLEMENT NEGOTIATIONS.

Evidence of settlement-related discussions is admissible for the purpose of proving undue delay (MRE 408).

Howard & Howard Attorneys, P.C. (by *Michael F. Wais*), for the plaintiff.

John R. Monnich and *John P. Jacobs, P.C.* (by *John P. Jacobs*), for the defendants.

Before: O'CONNELL, P.J., and BORRELLO and GLEICHER, JJ.

GLEICHER, J. Plaintiff Zaremba Equipment, Inc., commenced this insurance coverage lawsuit after a fire destroyed its premises. A jury awarded plaintiff $2,353,778, exclusive of costs, attorney fees, interest, and case evaluation sanctions. We affirm in part, reverse in part, vacate in part, and remand this case for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS

On February 21, 2003, a fire consumed the primary building occupied by plaintiff, a family-owned business that sells and services agricultural equipment, commercial vehicles, and seasonal items, such as snow blowers

and lawn mowers. Defendant Harco National Insurance Company sold plaintiff the insurance policy at issue in this case, which took effect on February 1, 2003, and constituted plaintiff's seventeenth consecutive Harco policy. Defendant Patrick Musall, Harco's agent, took plaintiff's order for the most recent commercial insurance policy considered here.

Plaintiff filed suit seeking to recover (1) damages for breach of the commercial-insurance contract, (2) penalty interest pursuant to MCL 500.2006, and (3) damages for defendants' failure to provide plaintiff with sufficient "replacement cost insurance coverage" of plaintiff's business building and its contents. The primary issues on appeal involve the coverage of the building and its contents. The 2003-2004 policy stated limits of $525,000 for the building, and $700,000 for its contents. After the fire, plaintiff learned that it would cost $1,192,000 to replace the building.

Plaintiff's complaint alleged that at an unspecified time before the fire, it informed defendants that "it wanted to be fully insured so it could rebuild and replace its property in the event of a complete loss." According to the complaint, Musall represented that Harco could issue a policy for "replacement cost insurance coverage" adequate to rebuild plaintiff's building and replace its contents. The complaint additionally alleged that Harco's failure to provide replacement cost coverage as promised constituted fraud and innocent misrepresentation. The complaint also pleaded a promissory estoppel claim and contained counts entitled "Breach of Fiduciary Duty," "Breach of Duty to Advise," and "Negligence," all similarly premised on Musall's inaccurate representation concerning the sufficiency of the promised insurance coverage. The negligence count set forth seven duties allegedly

breached by Musall, including failures to accurately advise plaintiff and to "accurately represent the nature and extent" of the building and contents coverage.

Defendants moved for partial summary disposition under MCR 2.116(C)(8), arguing that pursuant to *Harts v Farmers Ins Exch*, 461 Mich 1; 597 NW2d 47 (1999), Musall owed plaintiff no duty to advise it regarding the adequacy of the insurance it requested and, consequently, the complaint failed to state any claims other than those for breach of contract and recovery of penalty interest. Defendants explained that plaintiff's complaint lacked specific allegations establishing the existence of a special relationship between plaintiff and Musall and that in the absence of any special relationship, Musall owed plaintiff no duty other than to provide it the insurance it sought. Defendants withdrew this motion after plaintiff filed an amended complaint alleging that Musall had misrepresented the "nature and extent of [plaintiff's] coverage . . . ." The amended complaint asserted that Musall's misrepresentations gave rise to a "special relationship" between the parties and imposed on defendants the duty to "accurately advise [plaintiff] about the coverage provided" under its policy.

Shortly before the scheduled trial date, defendants filed motions in limine seeking to prohibit the introduction at trial of (1) communications between plaintiff's attorneys and Ed Whalen, Harco's adjuster, (2) testimony that the Harco policy was "too long or too difficult to read," and (3) any opinions regarding "adjusting" offered "by anyone other than a licensed adjuster." The trial court denied the motions in limine, and the case proceeded to trial.

The evidence revealed that plaintiff's Harco policies for 2002-2003 and 2003-2004 stated a policy limit of

$525,000 on plaintiff's building and shared identical language describing the building and contents coverage:

C. Limits of Insurance

The most we will pay for loss or damage in any one occurrence is the applicable Limit of Insurance shown in the Declarations.

* * *

G. Optional Coverages

If shown as applicable in the Declarations, the following Optional Coverages apply separately to each item.

* * *

3. Replacement Cost

* * *

e. We will not pay more for loss or damage on a replacement cost basis than the least of (1), (2) or (3), subject to f. below:

(1) The Limit of Insurance applicable to the lost or damaged property;

(2) The cost to replace the lost or damaged property with other property:

(a) Of comparable material and quality; and

(b) Used for the same purpose; or

(3) The amount actually spent that is necessary to repair or replace the lost or damaged property.

If a building is rebuilt at a new premises, the cost described in **e.(2)** above is limited to the cost which would have been incurred if the building had been rebuilt at the original premises.

f. The cost of repair or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

Musall testified that since 1998 or 1999 he had met with Jimmy Zaremba, plaintiff's business manager, at least twice a year to discuss plaintiff's insurance needs, Harco's available coverages, and potential policy limits. Musall admitted that at some point before plaintiff accepted Harco's 2002-2003 insurance proposal, Jimmy presented a "Customgard John Deere Insurance Proposal" prepared for plaintiff.[1] The Deere insurance proposal included a "Building Coverage" limit of $450,000 and identified an applicable "Extended Recovery Endorsement" that included "Guaranteed Replacement Cost." Musall conceded that Jimmy had asked him to "meet or beat" the Deere proposal and expressed a desire "to be fully insured." Musall utilized a software program called "Marshall & Swift" to prepare a "cost estimate" for reconstructing plaintiff's building, which calculated a building value of $494,449. According to Jimmy, Musall represented that Marshall & Swift was "the leader in the industry, and this is what insurance agents use all the time to come up with evaluations on a building." Although Musall did not recall telling Jimmy about the Marshall & Swift estimate, he admitted that after its preparation, plaintiff increased its building coverage limit to $525,000.

Musall also conceded that he made specific recommendations in response to Jimmy's request that plaintiff be "fully insured." He admitted that he would have recommended more coverage if he had known that it would cost $1,192,000 to replace the building because the "intent was there" to insure plaintiff "for the cost of replacing the building." Musall further explained that if

[1] Although Musall could not remember exactly when Jimmy produced the Deere proposal, Musall opined that he sold plaintiff at least two additional Harco policies after he and Jimmy reviewed and discussed the Deere quotation.

Jimmy had asked for $1.5 million of building coverage, Musall would have advised him that "I didn't feel he needed that much coverage."

Jimmy recalled that in July 2001 a car had run into a nearby restaurant, killing some customers. Jimmy heard that the restaurant owner "had a holy nightmare" with his insurance company and realized that if something happened to plaintiff's building, zoning issues would preclude rebuilding in the same location. At about the same time, Jimmy learned of Deere's "guaranteed replacement coverage" and consulted Musall to discuss the adequacy of plaintiff's coverage and to communicate his desire that plaintiff be "fully insured." Jimmy asked Musall to compare plaintiff's 2001 Harco coverage, which included an 80 percent coinsurance provision that obligated plaintiff to cover 20 percent of its own insured losses, with the Deere proposal. According to Jimmy, Musall represented that for $500 less than the Deere quotation, Harco would provide a building policy limit of $525,000 and that "with the replacement costs, we would be fully insured."

On April 18, 2002, Jimmy signed a two-year "Harco Dealer Package Application," which included a "Property Limits Schedule." The schedule described limits of $525,000 for the building and eliminated coinsurance. On the same schedule, Musall wrote, "All are agreed value," and checked a box indicating that the coverage was based on "replacement" value. Jimmy admitted that all of Musall's representations regarding the adequacy of plaintiff's coverage, including the Deere and appraisal discussions, concerned the 2002-2003 policy issued the year before the policy covering the fire loss.

On January 10, 2003, Jimmy met with Musall and accepted Harco's insurance proposal for the policy year beginning February 1, 2003. The parties agreed that

neither Musall nor Harco delivered the 2003 policy to plaintiff before the February 21, 2003, fire. Jimmy conceded that he had not read any of the previous Harco policies, the two-year coverage application that he signed in 2002, or the renewal application signed in 2003.

The jury found for plaintiff on all claims and awarded damages exactly as itemized by plaintiff's accounting expert, including an award of $496,185 for breach of contract, $258,554 in penalty interest, and $42,481 for "recovery of insurance proceeds." For plaintiff's building and contents, the jury awarded $1,556,558 under three theories separately entitled on the verdict form: negligence, fraud or innocent misrepresentation, and promissory estoppel. The trial court denied defendants' motions for judgment notwithstanding the verdict and a new trial.

On appeal, defendants raise several challenges to the jury's award relating to the building and contents coverage. We now address individually each theory supporting those aspects of the jury's award.

II. CHALLENGES TO THE NEGLIGENCE VERDICT

A. COMPARATIVE NEGLIGENCE AND PLAINTIFF'S DUTY TO READ ITS INSURANCE POLICY

Defendants challenge the trial court's refusal to instruct the jury that plaintiff had a duty to read its insurance policies. Although plaintiff did not receive a copy of the 2003-2004 Harco policy before the fire, defendants insist that plaintiff owed a duty to read its 2002-2003 insurance policy and the 2003-2004 insurance quotation it possessed, both of which set forth identical and specific limitations of building coverage. According to defendants, the earlier policy and the

current quotation language expressly contradict any notion that the policy provided "full replacement value" coverage. Defendants maintain that plaintiff's admitted failure to read the prior policy and the 2003-2004 quotation constituted comparative negligence and was a proximate cause of plaintiff's damages. Defendants reason that the trial court thus erred by failing to instruct the jury regarding plaintiff's duty to read its policy and by refusing to permit the jury to assess comparative fault. Plaintiff responds that it cannot be held to a duty to read the 2003-2004 policy that it did not yet possess and contends that Harco cannot "hide behind" policy language when a special relationship existed between the insurer and the insured.

This Court reviews de novo the content of a trial court's jury instructions. *Case v Consumers Power Co,* 463 Mich 1, 6; 615 NW2d 17 (2000). "In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Id*. Whether a duty exists also involves a question of law, which we consider de novo. *Dyer v Trachtman*, 470 Mich 45, 49; 679 NW2d 311 (2004).

At trial, plaintiff premised its negligence claims on Jimmy Zaremba's meetings with Musall in 2002, in which they discussed plaintiff's interest in "full, replacement coverage" for its building, the John Deere quotation, and the Marshall & Swift "appraisal."[2] Plaintiff advanced three theories of liability arising

[2] Plaintiff's counsel contended at oral argument that Jimmy and Musall had a separate and distinct conversation regarding replacement-value coverage in January 2003. This argument finds no support in the record.

from the 2002 encounters: (1) Musall negligently appraised the value of plaintiff's building as $496,000, which represented less than half the building's actual replacement value, (2) Musall negligently failed to procure the requested replacement-value coverage so that plaintiff would be "fully insured," and (3) Musall negligently failed to advise plaintiff that the coverage contained in the Harco policy did not provide guaranteed "full replacement value" in the event of a catastrophic loss, but instead required Harco to pay only a defined limit of $525,000.

The parties agreed that *Harts* controlled plaintiff's ability to prosecute its negligence claims.[3] In *Harts*, our Supreme Court considered whether an insurance agent owes a duty to advise an insured regarding the adequacy of coverage. *Harts*, 461 Mich at 2. "[U]nder the common law, an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage" because the agent's job consists merely of "present[ing] the product of his principal and tak[ing] such orders as can be secured from those who want to purchase the coverage offered." *Id*. at 8. In a footnote, the Supreme Court observed: "This limited role for the agent may seem unusually narrow, but it is well to recall that this is consistent with an insured's obligation to read the insurance policy and raise questions concerning coverage within a reasonable time after the policy has been issued. " *Id*. at 8 n 4, citing *Parmet Homes, Inc v Republic Ins Co,* 111 Mich App 140, 145; 314 NW2d 453 (1981).

Notwithstanding the general no-duty-to-advise rule, the Supreme Court concluded in *Harts* that "when an

[3] During a discussion of jury instructions, defense counsel stated: "But I can tell you, since we started, since this has been decided in '99, Harts runs the show. I mean, that's the case that says what we can do and can't do . . . ."

event occurs that alters the nature of the relationship between the agent and the insured," a special relationship may result, creating a duty on the part of the agent to advise an insured in some respect regarding insurance issues. *Harts*, 461 Mich at 10. The change in the agent-insured relationship becomes manifest when

> (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. [*Id*. at 10-11.][4]

When a special relationship exists, an agent assumes a duty to advise the insured regarding the adequacy of insurance coverage. *Id*. at 10-11.

At trial, defendants conceded that the jury could properly decide whether Musall had adequately advised plaintiff. A supplemental jury instruction modeled on the *Harts* special-relationship criteria, given without objection, began: "[G]enerally, an insurance agent has no duty to advise a potential insured about any insurance coverage. However, the existence of a special relationship between an agent and his insured will give rise to a duty to advise." The instruction continued by quoting the four *Harts* criteria for a special relationship, and concluded: "If you find that a special relationship existed between Plaintiff and Defendant Musall because of one or more of the four circumstances exists, then the law places upon Mr. Musall a duty to advise Plaintiff."

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[4] In a footnote, the Supreme Court suggested that a request for "full coverage" might qualify as "an ambiguous request for coverage" that in certain circumstances could require clarification. *Harts*, 461 Mich at 11 n 11.

Although the jury determined that Musall and plaintiff shared a special relationship, we reject plaintiff's contention that this finding, standing alone, eliminated any claim of comparative fault associated with or arising from plaintiff's duty to read its insurance documents. Under *Harts*, an insurance agent may create a special relationship by engaging in conduct inconsistent with merely taking a customer's order. But we view as simply illogical the suggestion that an agent's decision to undertake additional responsibilities on behalf of an insured immunizes the insured from the consequences of its own negligence. The negligence of one party does not eliminate the legal requirement that an opposing party use ordinary care. See Mi Civ JI 10.04.

Further, the law applied in Michigan leaves no room to doubt that as a general rule, an insured must read his or her insurance policy. As the Supreme Court summarized in *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999): " 'This court has many times held that one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.' " (Citation omitted.) In *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 394-395; 729 NW2d 277 (2006), this Court similarly observed:

> It is well established that an insured is obligated to read his or her insurance policy and raise any questions about the coverage within a reasonable time after the policy is issued. Consistent with this obligation, if the insured has not read the policy, he or she is nevertheless charged with knowledge of the terms and conditions of the insurance policy.[5]

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[5] This Court recognized in *Casey* a limited exception to the insured's duty to read the policy, which it described as the situation "when the insurer renews the policy but fails to notify the insured of a reduction in coverage." *Casey*, 273 Mich App at 395. In that circumstance, the insurer

In *Harts*, our Supreme Court specifically and favorably referred to this Court's decision in *Parmet Homes*, in support of the general rule that an agent has no responsibility to advise a customer regarding coverage. In *Parmet Homes*, the plaintiff filed suit seeking to recover fire loss benefits under a builder's risk policy. Shortly before the plaintiff's prior policy expired, the defendant, an independent insurance agency, had switched insurance companies to "better meet the needs of plaintiff." Some evidence demonstrated that the agent had not consulted the plaintiff about the change, but had simply mailed it a copy of the new policy with premium invoices bearing the new insurance company's name. While the plaintiff's former policy required reports of construction starts every 90 days, the new policy required notice of construction starts every 30 days. *Parmet Homes*, 111 Mich App at 143. The defendant insurance company denied coverage for a fire loss, relying on the 30-day notice provision. *Id*. at 143-144.

The plaintiff, insisting that it had not known that the defendant agent had changed insurers or that a new notice requirement applied, brought a negligence action against the agent. The plaintiff admitted, however, that it had never read the new policy. *Id*. at 144. The trial court instructed the jury as follows:

> "Generally, . . . the law in Michigan places a duty upon an insured to read his insurance policy. It is for you to decide what a reasonably careful person would, or would not do under the circumstances which you find existed in this case. If you find that Parmet Homes acted reasonably in believing the policy to be a renewal of the [Insurance

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remains bound to the earlier policy and is estopped from denying coverage "on the basis of the discrepancy between the current policy and the prior one that was not brought to the insured's attention." *Id*. That exception does not apply here.

> Company of North America] policy, then Parmet Homes does not have a duty to read the policy. If you find that a reasonably careful person would have read his policy under the circumstances which you find existed in this case, you may consider this with respect to the plaintiff's conduct in considering contributory negligence." [*Id*. at 144-145.]

The defendants objected to the instruction excusing the plaintiff from reading the policy. *Id*. at 145. This Court approved the instruction, however, because the "plaintiff presented evidence that it was led to believe" that the new policy merely renewed the prior one, explaining that no duty to read exists when "a policy is renewed without actual notice to the insured that the policy has been altered." *Id*.

In *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 319; 661 NW2d 248 (2003), this Court addressed the application of comparative fault principles in a case involving an allegation that an insurance agent negligently failed to secure the coverage requested. The defendant insurer in *Holton* argued that the plaintiffs' comparative negligence caused the fire that ultimately led to an insurance loss. *Id*. at 320. This Court framed the issue as "whether a defendant insurer is entitled to an allocation of fault for conduct in an underlying property loss, when a plaintiff seeks recovery for a shortfall in insurance coverage on the basis of the insurer's negligence in procuring insurance." *Id*. at 321. The Court held that "the provisions for comparative negligence" generally apply in a tort-based action brought against an insurance agent, but that the plaintiffs' alleged negligence in starting the fire had no relevance to a comparative fault analysis, given that the "[d]efendants have proffered no evidence showing that plaintiffs' or the contractor's alleged negligence in causing the fire is a factor in whether the resulting property damage would be covered under plaintiffs'

homeowner's insurance, which defendants allegedly failed to provide." *Id*. at 323-325.[6] Notably, the *Holton* Court specifically cited MCL 600.2957(1) and MCL 600.6304(1) as authority for its conclusion that the plaintiffs' action was "tort-based." *Id*. at 323-324.

Pursuant to MCL 600.6304, a jury must consider comparative fault if any fault is attributable to the plaintiff. MCL 600.6304 provides:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
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> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under [MCL 600.2925d], regardless of whether the person was or could have been named as a party to the action.
>
> (2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.[7]

The statute defines "fault" as including "an act, omission, conduct, including intentional conduct, a breach of

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[6] In *Holton*, this Court did not address the insured's duty to read the policy.

[7] In MCL 600.2957(1), the Legislature provided:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to [MCL 600.6304], in direct proportion to the person's percentage of fault.

warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party." MCL 600.6304(8).

The doctrine of comparative fault requires that every actor exercise reasonable care. *Hierta v Gen Motors Corp (On Rehearing)*, 196 Mich App 20, 23; 492 NW2d 738 (1992). "The general standard of care for purposes of comparative negligence, while differing in perspective, is theoretically indistinguishable from the applicable standard for determining liability in common-law negligence: the standard of conduct to which one must conform for his own protection is that of 'a reasonable [person] under like circumstances.' " *Lowe v Estate Motors Ltd*, 428 Mich 439, 455-456; 410 NW2d 706 (1987) (citation omitted). The question of a plaintiff's negligence for failure to use due care is a question for the jury unless no reasonable minds could differ or the determination involves some ascertainable public policy considerations. *Rodriguez v Solar of Michigan, Inc*, 191 Mich App 483, 488; 478 NW2d 914 (1991).

Because plaintiff's negligence claims in the instant case are tort-based, we conclude that the plain language of MCL 600.6304 and MCL 600.2957 required the trial court to give defendants' requested instruction regarding comparative negligence. We additionally conclude that plaintiff's admitted failure to read the policy could qualify as comparative negligence and that the trial court should have permitted the jury to consider whether plaintiff unreasonably failed to read the 2002-2003 policy, the 2002 application, and the 2003-2004 insurance quotation. We now apply these legal principles to plaintiff's liability theories.

Plaintiff alleged that Musall negligently failed to procure the insurance coverage that plaintiff requested:

guaranteed replacement-value coverage for its building and contents. According to plaintiff, Musall also neglected to advise plaintiff that the policy purchased contained a defined limit rather than the "full replacement coverage" that plaintiff had specifically requested. Defendants correctly observe that if plaintiff had read its 2002-2003 policy, it would have easily ascertained that regardless of Musall's representations to the contrary, the policy clearly and unambiguously provided that the "most we will pay for loss or damage in any one occurrence is the applicable Limit of Insurance shown in the Declarations."

In light of plaintiff's legal duty to read its 2002-2003 insurance policy, a jury could have reasonably concluded that during the months between plaintiff's purchase of the 2002-2003 Harco policy and the February 2003 fire, plaintiff negligently failed to question Musall about its building coverage. Similarly, a jury could have reasonably determined that plaintiff should have discovered that the policy language contradicted Musall's representations regarding "full" and "guaranteed replacement value" coverage.[8] Furthermore, MCL 600.6304(1)(b) unambiguously requires the finder of fact to assess the percentage of fault attributable to a plaintiff if the plaintiff's fault constituted a proximate cause of the plaintiff's damages. "[U]nder [MCL 600.6304], if a defendant presents evidence that would allow a reasonable person to conclude that a plaintiff's negligence constituted a proximate cause of [the plaintiff's] injury and subsequent damage, the trier of fact must be allowed to consider such evidence in apportion-

[8] We reject plaintiff's contention that the policy lacked clarity or harbored ambiguity. On the contrary, the policy clearly stated a coverage limitation of $525,000. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47-51; 664 NW2d 776 (2003).

ing fault." *Shinholster v Annapolis Hosp*, 471 Mich 540, 552; 685 NW2d 275 (2004). A jury could reasonably conclude that plaintiff's failure to read its 2002-2003 policy qualified as a proximate cause of its failure to obtain clarification regarding the Harco policy limits before the February 2003 fire.

In contrast, plaintiff's liability claims arising from Musall's negligent appraisal of its building do not logically lend themselves to a comparative negligence analysis. In addition to plaintiff's insufficient coverage claim, plaintiff contended that Musall negligently calculated the replacement value of its building. Plaintiff's policy and the related documents do not contain, however, any information that might have called into question the accuracy of the Marshall & Swift computation or Musall's allegedly negligent representation that plaintiff could replace its building within the limits of the policy. Thus, under the negligent appraisal theory of liability, plaintiff's own failure to read its insurance documents does not represent a proximate cause of its damages.

Plaintiff submitted all three of its negligence theories to the jury as a single unit, and the jury returned a general verdict finding negligence on defendants' part. Although our comparative negligence analysis applies to some but not all of plaintiff's negligence claims, we must nevertheless reverse the entire negligence verdict because it is impossible to determine which theories of negligence liability the jury adopted. *Tobin v Providence Hosp*, 244 Mich App 626, 645; 624 NW2d 548 (2001).

Finally, we reject plaintiff's claim that defendants "waived" a comparative negligence defense in this case by not including it as an affirmative defense in their first responsive pleading. Defendants' answer to plaintiff's amended complaint included the following affir-

mative defense: "Plaintiff has a duty to read the insurance policy and raise questions within a reasonable time. It cannot claim it was defrauded if it has the policy in its possession because of its precedent duty. It cannot claim estoppel because it should know what the policy covers." Defendants included similar language in their initial answer. Defendants also brought at least two motions for summary disposition, asserting that plaintiff had a duty to read its policy, and defendants requested a jury instruction delineating this duty, as well as an instruction regarding comparative negligence. Defendants' failure to specifically label the duty to read defense as a comparative negligence defense should not prevent them from defending on that basis, as they attempted to do throughout the proceedings. *Meridian Mut Ins Co v Mason-Dixon Lines, Inc (On Remand)*, 242 Mich App 645, 648; 620 NW2d 310 (2000). Additionally, defendants' failure to specifically label plaintiff's duty to read the policy as an affirmative defense did not foreclose the trial court from properly instructing the jury regarding comparative fault.

In summary, we hold that when an insurance agent elects to provide advice regarding coverage and policy limits, the agent owes a duty to exercise reasonable care. The insured has a duty to read its insurance policy and to question the agent if concerns about coverage emerge. A jury should consider these corresponding duties in the crucible of comparative negligence.

B. SPECIAL INSTRUCTION 4(c)

Defendants next contend that the trial court erred when it submitted to the jury special instruction 4(c), which described one of Musall's duties as follows: "The duty to properly procure and place insurance coverage on the Property so that the Policy would meet or exceed

all of [plaintiff's] expectations regarding such coverage[.]" Defendants argue that this instruction embodied a "rule of reasonable expectations," which the Michigan Supreme Court specifically disapproved in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-63; 664 NW2d 776 (2003).

The rule of reasonable expectations permits a court to construe an insurance contract in a manner contradicted by its unambiguous terms. As described by Professor Keeton, this rule provides that the "objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Keeton, *Insurance law rights at variance with policy provisions*, 83 Harv L R 961, 967 (1970). In *Wilkie*, our Supreme Court rejected any notion that the rule of reasonable expectations, even "objectively reasonable ones," applies in Michigan: "The rule of reasonable expectations clearly has no application to unambiguous contracts. That is, one's alleged 'reasonable expectations' cannot supersede the clear language of a contract." *Wilkie*, 469 Mich at 60.

Contrary to defendants' argument here, the analysis in *Wilkie* did not require that the trial court eliminate special instruction 4(c). *Wilkie* applies to the *construction* of insurance contracts, rather than the duties attendant to the *procurement* of insurance contracts. The cases overruled in *Wilkie*, such as *Powers v DAIIE*, 427 Mich 602; 398 NW2d 411 (1986), also involved the construction of contractual language, rather than a determination whether an agent properly procured the coverage requested by the insured.

An insurance agent owes a duty to procure the insurance coverage requested by an insured. *Khalaf v*

Bankers & Shippers Ins Co, 404 Mich 134, 142-143; 273 NW2d 811 (1978); *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 87; 492 NW2d 460 (1992). "The insured's agent must strictly follow the insured's instructions which are clear, explicit, absolute, and unqualified." 3 Couch, Insurance, 3d, § 46.28, p 46-33. Special jury instruction 4(c) addressed Musall's duty to procure the coverage plaintiff sought. It did not dictate any manner of construing the words within plaintiff's insurance policy, the issue resolved by our Supreme Court in *Wilkie*.

Nevertheless, special instruction 4(c) incorrectly stated the law. Musall had no duty to procure coverage that would "meet or exceed all of [plaintiff's] expectations." Instead, the law only required Musall to procure the coverage actually ordered by plaintiff. Plaintiff's expectations might be relevant to this duty, but no recognized legal authority supports the portion of the instruction given that concerned meeting or exceeding plaintiff's expectations. Therefore, on remand, the court should not give this specific portion of the instruction to the jury.

III. CHALLENGES TO THE FRAUD AND INNOCENT MISREPRESENTATION VERDICTS

Defendants next contend that plaintiff's failure to read the policies eliminates plaintiff's claims for fraud and innocent misrepresentation. In support of this argument, defendants rely principally on *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994), in which this Court observed: "There can be no fraud where a person has the means to determine that a representation is not true."

To establish a prima facie case of fraud, a plaintiff must prove that (1) the defendant made a material

representation, (2) the representation was false, (3) the defendant knew that it was false when it was made, or made it recklessly, without any knowledge of its truth and as a positive assertion, (4) the defendant made the representation with the intention that the plaintiff would act on it, (5) the plaintiff acted in reliance on it, and (6) the plaintiff suffered injury because of that reliance. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000). This Court has frequently reiterated that, to sustain a fraud claim, the party claiming fraud must *reasonably* rely on the material misrepresentation. See *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005) (holding that the plaintiff had to "show that any reliance on defendant's representations was reasonable"); see also *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004).

An innocent misrepresentation claim requires proof that (1) the defendant made a material representation, (2) the representation was false, (3) the defendant made it with the intention of inducing reliance by the plaintiff, (4) the plaintiff acted in reliance on the representation, and (5) the plaintiff thereby suffered an injury that benefited the defendant. *State-William Partnership v Gale*, 169 Mich App 170, 178; 425 NW2d 756 (1988). Reasonable reliance also must exist to support claims of innocent misrepresentation. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999).

Defendants argue that because the insurance documents previously provided to plaintiff stated a definite coverage limit of $525,000 applicable to plaintiff's building, plaintiff could not have reasonably relied on Musall's representations in 2001 or 2002 that the policy provided full replacement coverage. We agree that if

plaintiff had read the clear and unambiguous 2002 policy language, it would have learned that the policy did not provide unlimited replacement value coverage for the building, but had a defined limit of $525,000. Furthermore, because the record reflects no further discussions between the parties regarding the $525,000 policy limit, see note 2 of this opinion, we agree with defendants that as a matter of law, plaintiff cannot prevail on a fraud or innocent misrepresentation theory premised on Musall's representations regarding the policy limits. Under the circumstances of this case, plaintiff had the means to determine the truth or falsity of Musall's representations. But because plaintiff's fraud and innocent misrepresentation claims sound in tort, MCL 600.6304 compels the conclusion that a jury must decide whether plaintiff's failure to read the policy constituted a proximate cause of its damages.[9]

However, our resolution of this aspect of plaintiff's fraud and innocent misrepresentation claims does not end our inquiry. As noted previously, plaintiff's fraud and innocent misrepresentation claims also encompassed Musall's statements regarding the accuracy of the Marshall & Swift computation and whether plaintiff could actually replace its building for $525,000. Neither the policy language nor any documents provided by defendants regarding the policy would have shed light on the accuracy of the Marshall & Swift estimate or Musall's representation that the $525,000 coverage limit constituted adequate replacement coverage. Therefore, the record could support plaintiff's claims that Jimmy reasonably relied on Musall to accu-

[9] "In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed." MCL 600.6304(2); see also *Holton,* 255 Mich App at 323-326.

rately evaluate the cost of replacing the building and also reasonably relied on Musall's representation that the Marshall & Swift calculation constituted a reasonable assessment of the building's replacement cost. But because the verdict form did not distinguish between the proper and improper theories of fraud and innocent misrepresentation submitted to the jury, a new trial is required on the remaining fraud and innocent misrepresentation theories. *Tobin,* 244 Mich App at 645-646.

IV. PROMISSORY ESTOPPEL

The elements of a promissory estoppel claim consist of (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided. *Booker v Detroit*, 251 Mich App 167, 174; 650 NW2d 680 (2002), rev'd in part on other grounds 469 Mich 892 (2003). " 'A promise is a manifestation of intention to act or refrain from acting in a specific way, so made as to justify a promisee in understanding that a commitment has been made.' " *State Bank of Standish v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993) (citation omitted). The promise must be definite and clear, and the reliance on it must be reasonable. *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 134; 506 NW2d 556 (1993). This Court has held that no action for promissory estoppel may lie when an oral promise expressly contradicts the language of a binding contract. See *Novak*, 235 Mich App at 687.

We agree with defendants that the trial court erred by permitting the jury to consider plaintiff's promissory estoppel claim. Plaintiff failed to identify any promises made by Musall beyond those contained in the insur-

ance policy. Furthermore, Musall's alleged representations that plaintiff had "full coverage" or "replacement cost coverage" were not promises, but "words of assurance or statements of belief . . . ." *State Bank of Standish,* 442 Mich at 90. Therefore, on retrial, plaintiff may not submit a promissory estoppel claim to the jury.

V. EXPERT TESTIMONY REGARDING MUSALL'S DUTIES

Defendants next assert that the trial court erred by denying their motion for judgment notwithstanding the verdict based on plaintiff's failure to offer expert testimony regarding the standard of care owed by Musall. According to defendants, because Musall was a licensed professional at the time of his actions and omissions relevant to this case, plaintiff could establish the standard of care required only through the introduction of expert testimony provided by a similarly licensed professional. In support of this argument, defendants cite several cases from other jurisdictions and one unpublished Michigan case, *Nofar v Eikenberry*, unpublished memorandum opinion of the Court of Appeals, issued October 30, 1998 (Docket No. 197231).

This Court reviews de novo a trial court's decision to deny a motion for judgment notwithstanding the verdict. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). The determination whether the nature of a claim involves ordinary negligence or professional negligence is also subject to review de novo. *Bryant v Oakpointe Villa Nursing Ctr, Inc,* 471 Mich 411, 419; 684 NW2d 864 (2004).

Aside from the unpublished *Nofar* memorandum opinion,[10] Michigan's appellate courts have not consid-

[10] Pursuant to MCR 7.215(C)(1), an unpublished opinion has no precedential value. However, this Court may follow an unpublished

ered the necessity of expert testimony in cases alleging negligence on the part of an insurance agent. In *Nofar*, the trial court directed a verdict for the defendants on the negligence claim because the plaintiff failed to present expert testimony regarding an insurance agent's breach of the standard of care. This Court affirmed, explaining that

> [p]laintiffs failed to present any evidence as to the standard of care applicable to insurance professionals. The complaint alleged that although defendants first bound coverage on the building, they notified plaintiffs prior to the accident that they exceeded their authority, but would try to obtain alternative coverage. The complaint alleged that this conduct was negligent and below the standard of care for professional licensed insurance agents. Where plaintiffs failed to support this allegation with any evidence as to the proper standard of care, the trial court correctly granted a directed verdict as to the negligence count. [*Nofar*, p 2.]

The Court observed elsewhere in *Nofar* that "[w]here the lack of professional care is so manifest that it would be within the common knowledge and experience of laypersons, expert testimony is not required." *Id*.

In other jurisdictions, a split of authority exists regarding the necessity of expert testimony in insurance agent negligence cases. Generally, the opinions focus on the underlying duty allegedly breached by the agent and evaluate whether the duty inherently involved the exercise of professional skills likely to fall outside the common understanding of lay jurors. For example, *Atwater Creamery Co v Western Nat'l Mut Ins Co*, 366 NW2d 271 (Minn, 1985), considered a claim that an insurance agent negligently failed to notice an insured's gap in coverage and to determine whether

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opinion if it finds the reasoning persuasive. See *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 432; 648 NW2d 205 (2002).

insurance was available to fill that gap. The plaintiff had not requested that the agent review the coverage, but asserted the existence of an independent duty to do on the basis of their 17-year relationship. *Id*. at 279. The Minnesota Supreme Court held that the standard of care required of the agent had to be established through expert testimony because the claimed deficiency in his performance centered on the "professional judgment of the agent in the absence of requests for action . . . ." *Id*.

In *Humiston Grain Co v Rowley Interstate Transportation Co, Inc*, 512 NW2d 573, 575 (Iowa, 1994), the Iowa Supreme Court observed that "[b]ecause insurance agents are professionally engaged in transactions ranging from simple to complex, the requirement of expert testimony varies from jurisdiction to jurisdiction depending on the nature of the alleged negligent act." When an agent fails to procure the coverage requested, expert testimony is generally unnecessary because this circumstance can be "commonly understood by laypersons . . . ." *Id*. On the other hand, cases involving an "agent's alleged failure to discern coverage gaps or risks of exposure in more complex business transactions" may necessitate expert testimony. *Id.* The court ruled in *Humiston Grain* that expert testimony was required to prove that the defendant agent had overlooked the plaintiff's subrogation rights despite the absence of a specific request for information on this subject. *Id*. at 575-576.

We agree with the analyses in *Atwater Creamery* and *Humiston Grain* that the need for expert testimony in an insurance coverage case should be determined on a case-by-case basis and depends on the nature of the underlying claims of negligence raised against the agent. If the duty alleged to have been breached falls

beyond the understanding of the average juror, a trial court may require that the party alleging negligence produce expert testimony supporting the claim. This is entirely consistent with longstanding Michigan caselaw holding that when the claimed negligence involves " 'a matter of common knowledge and observation,' " no expert testimony is required. *Daniel v McNamara*, 10 Mich App 299, 308; 159 NW2d 339 (1968) (citation omitted). Indeed, "while expert testimony is the traditional and the preferred method of proving medical malpractice, exceptions to the need for expert testimony have been recognized." *Locke v Pachtman*, 446 Mich 216, 230; 521 NW2d 786 (1994).

Plaintiff's negligence claims against Musall included (1) misrepresentation of coverage terms, (2) miscalculation of the building replacement costs, (3) failure to advise plaintiff that the policy did not include "full replacement coverage," and (4) failure to provide plaintiff with "clear and accurate advice" in response to plaintiff's request for replacement value coverage. We conclude that proof of these allegations does not require expert testimony. The law required Musall to accurately represent the nature and extent of the coverage. Whether he breached this duty constitutes a question of fact that the jury could answer on the basis of the jurors' common knowledge and ordinary experiences. Similarly, an average juror possesses the capability of deciding whether Musall provided plaintiff with "clear and accurate advice" regarding the replacement value coverage or instead failed to advise plaintiff that its coverage would not suffice to replace its building.

If plaintiff had asserted that Musall's standard of care required a certain type of appraisal or a referral for a professional appraisal, or any other specific action, expert testimony might be necessary. Here, however,

plaintiff alleged that Musall voluntarily elected to perform an appraisal and provided plaintiff with an incorrect building value. Defendants never claimed that the value Musall selected represented the correct cash value of the premises or the replacement value. Instead, defendants argued that the Marshall & Swift figure was only a "cost estimate," and not an appraisal. Plaintiff's negligence allegations premised on the miscalculated building value may be easily and readily understood by a lay juror; the record evidence reveals that Musall's miscalculation occurred in part because he applied an incorrect measure of the building's square footage to the Marshall & Swift calculation. The miscalculation issue thus presented relatively simple questions of fact, rather than questions concerning the scope of standard of care required of Musall. Musall vehemently denied that he used the Marshall & Swift estimate to appraise the building. If the jury had instead believed that Musall intended the Marshall & Swift calculation to serve as an appraisal, expert testimony would not have aided the determination of whether Musall acted negligently.

The dissent argues that "significant questions" regarding Musall's conduct "fell far outside" a layperson's knowledge. *Post* at 51. We reiterate that, in our view, this record contains no such questions. Musall admitted that he undertook the Marshall & Swift calculation to assist plaintiff and claimed that he repeatedly advised Jimmy that the Marshall & Swift value did not constitute an appraisal. Jimmy denied this and testified that Musall vouched for the accuracy and reliability of the Marshall & Swift calculation. The jury believed Jimmy, not Musall. No expert witness could have added anything pertinent to the dispute between the two parties regarding the content of their conversation. Furthermore, the trial court considered defendants' posttrial

claim that expert testimony would have assisted the jury in deciding whether Musall had been negligent and rejected it pursuant to the following logic:

> There was ample evidence to support the negligence claim, and . . . I hate to disparage the man, but I felt it was so obvious that he did an extremely negligent job as an agent. It was so obvious I'm not sure expert testimony would have either, number one, [been] needed or would have added anything that wasn't so patently obvious. And I don't know if the transcript will convey that, but it should.

On retrial, however, should the court conclude that expert testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue," it certainly remains free to permit the testimony, in accordance with MRE 702.

VI. PLAINTIFF'S USE OF LETTERS REGARDING SETTLEMENT

Defendants next contend that the trial court erroneously permitted plaintiff to introduce into evidence "dozens" of presuit letters written by plaintiff's counsel that contained information regarding settlement demands and settlement negotiations. Defendants challenge the letters as constituting hearsay not permitted by any exception to the rule against hearsay and as inadmissible evidence of settlement negotiations under MRE 408.

This Court reviews for an abuse of discretion a trial court's decision to admit evidence. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). The abuse of discretion standard recognizes " 'that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.' " *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809

(2006) (citation omitted). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Our review of the letters and their use during the trial reveals that plaintiff employed multiple items of correspondence between the parties to prove that defendants delayed paying claims that were not reasonably in dispute, in violation of MCL 500.2006, and that the violation entitled plaintiff to 12 percent statutory penalty interest. Although the trial court submitted this issue to the jury without objection, the parties later agreed that the court should have decided it. The trial court independently affirmed the jury's verdict in a separate posttrial order.

The letters referred to ongoing settlement negotiations, the need for additional information to resolve various claims, requests by plaintiff for additional and faster payments, and recapitulated previous events. But MRE 408 provides, in relevant part:

> This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Because the rule explicitly contemplates the admissibility of evidence of settlement-related discussions for the purpose of "negativing a contention of undue delay," it logically follows that evidence of settlement discussions may also qualify as admissible to *prove* undue delay.

Defendants' hearsay argument has greater merit. Although plaintiff contends that it did not offer the

letters to prove the truth of the matters asserted in them, plaintiff's counsel vigorously argued regarding the substance of the letters during the trial. These arguments, however, related only to plaintiff's claim for penalty interest, and on appeal defendants have not challenged the propriety of the trial court's entry of that portion of the judgment awarding penalty interest. Consequently, any error attending the introduction of the letters qualifies as harmless. MCR 2.613(A) ("An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."); MRE 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . .").

It appears unlikely that the challenged letters will be relevant on retrial. Hearsay evidence contained in the letters may be offered on retrial for a purpose other than "to prove the truth of the matter asserted" as long as that purpose bears relevance to the underlying claims and defenses of the parties. MRE 401; MRE 801(c). But we cannot envision how, and we find it highly unlikely that, the letters might make the existence of Musall's negligence, or the existence of fraud or innocent misrepresentation, more probable than these matters would be without the letters in evidence. MRE 401.

VII. PLAINTIFF'S CLAIMS FOR BREACH OF CONTRACT, RECOVERY OF INSURANCE PREMIUMS, AND PENALTY INTEREST

On appeal, defendants have failed to brief any legal challenges to the jury's awards regarding plaintiff's claims of breach of contract, recovery of insurance

premiums, and penalty interest. Because defendants have neglected to brief any issues criticizing the jury's verdicts on these claims, they have abandoned any legal challenges to these verdicts. *Dep't of Transportation v Initial Transport, Inc*, 276 Mich App 318, 334; 740 NW2d 720 (2007), rev'd in part on other grounds 481 Mich 862, 863 (2008). We therefore affirm the judgment entered with regard to the jury awards concerning plaintiff's claims of breach of contract, recovery of insurance premiums, and penalty interest claims.

VIII. SUMMARY

We affirm the judgment in favor of plaintiff regarding its claims of breach of contract, recovery of insurance premiums, and penalty interest. We reverse the judgment in favor of plaintiff on its claims of negligence, fraud, and innocent misrepresentation and remand this case for a new trial of these claims consistent with this opinion. We also reverse and vacate the judgment in favor of plaintiff for promissory estoppel and vacate the trial court's order granting case evaluation sanctions and prejudgment and postjudgment interest. We do not retain jurisdiction.

BORRELLO, J., concurred.

O'CONNELL, P.J. (*concurring in part and dissenting in part*). I concur with the majority opinion in all respects except for its determination that an expert witness was not required for the negligence claim. I do not disagree with the conclusion that whether expert testimony is required must be determined on a case-by-case basis; I disagree with the conclusion that it was not necessary in this case.

To the extent that the question before a jury is whether the insurance agent did not provide the type of coverage requested, I agree that no expert testimony is necessary. But, to the extent that the issues go beyond such simple questions, expert testimony is required. See *Humiston Grain Co v Rowley Interstate Transportation Co, Inc*, 512 NW2d 573, 576 (Iowa, 1994) ("[W]here an insurance agent is alleged to have breached a professional duty, if the error or omission extends beyond the agent's mere failure to procure coverage requested and paid for by the client, proof of the standard of care applicable to the circumstances must be established by expert testimony."); *Atwater Creamery Co v Western Nat'l Mut Ins Co*, 366 NW2d 271, 279 (Minn, 1985) (holding that expert testimony was required to establish standard of care because "the issue center[ed] around the professional judgment of the agent in the absence of requests for action"); *Todd v Malafronte*, 3 Conn App 16, 19; 484 A2d 463 (1984) ("Insofar as the sale of insurance requires specialized knowledge, we agree that this case differs from the ordinary negligence action since matters within that specialized body of knowledge are crucial to the determination of the issues raised.").

In the present case, there were significant questions that the jury needed to answer that fell far outside a layperson's general knowledge. Was it reasonable or standard practice for an agent to use the Marshall & Swift calculation? Do/should agents generally voluntarily elect to perform the calculation; should they? Do/should agents generally explain to the insured that such a calculation is not an appraisal value; should they? Does/should an agent generally recommend that an insured seek an independent appraisal? Given that terms in insurance contracts often have meanings separate and apart from their common meaning, do agents

have a responsibility to explain what various terms, such as "replacement value," mean? To what extent should agents explain the terms and limitations of a policy to an insured? How often? These are matters of specialized knowledge that require an expert to help the jury with its fact-finding. Like the plaintiff in *Nofar v Eikenberry*, unpublished memorandum opinion of the Court of Appeals, issued October 30, 1998 (Docket No. 197231), p 2, plaintiff "failed to present any evidence as to the standard of care applicable to insurance professionals." Reversal is required.

Because we are remanding this case to the trial court for a new trial on the negligence claim, albeit for a different reason, I concur in the result.[1]

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[1] I concur with the majority opinion that the settlement letters are not admissible on retrial.

PEOPLE v WILCOX

Docket No. 278189. Submitted May 13, 2008, at Lansing. Decided June 5, 2008. Approved for publication July 31, 2008, at 9:05 a.m.

Larry E. Wilcox was convicted by a jury in the St. Joseph Circuit Court of first-degree criminal sexual conduct (victim less than 13 years old). The court, Paul E. Stutesman, J., sentenced the defendant as a second-offense habitual offender to 10 to 40 years of imprisonment. The defendant appealed.

The Court of Appeals *held*:

1. The admission pursuant to MCL 768.27a of evidence indicating that the defendant had previously been convicted of the same offense at a time well before MCL 768.27a was effective did not violate the Ex Post Facto Clause of the federal constitution. That clause is not violated where, as here, the altered standard for admission of evidence does not lower the quantum of proof or the value of the evidence needed to convict a defendant.

2. The 10-year minimum sentence satisfied the requirements of the sentencing guidelines and is not a departure from the recommended minimum range. MCL 520.520f provides for a mandatory minimum term of at least five years. MCL 769.34(2)(a) requires the imposition of a statutory minimum term and provides that imposing such mandatory minimum sentence is not a departure. MCL 769.34(2)(b) provides that the minimum sentence shall not exceed 2/3 of the maximum sentence, which in this case is life imprisonment, MCL 750.520b(2). The 10-year minimum sentence in this case is at least five years and is less than 2/3 of the maximum sentence.

Affirmed.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Douglas Fisher*, Prosecuting Attorney, and *Mark G. Sands*, Assistant Attorney General, for the people.

Bennett Law Office (by *P. E. Bennett*) for the defendant.

Before: DAVIS, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM. Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and was sentenced as a second-offense habitual offender, MCL 769.10, to 10 to 40 years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At trial, a detective read into evidence from an official court document that stated that defendant was previously sentenced for second-degree criminal sexual conduct. Part of the evidence relating to the prior crime indicated that defendant had engaged in sexual contact with a person under the age of 13. That prior conviction occurred in October 1987, nineteen years before this trial. Defendant objected to the entry of the prior-conduct evidence.

Defendant argues on appeal that the prior-conduct evidence should not have been admitted under a new Michigan statute, MCL 768.27a, because the Legislature was not authorized to enact such a statute and because it violated the Ex Post Facto Clause of the United States Constitution. Defendant's arguments on these issues must fail in light of two recent decisions from our Court, *People v Pattison*, 276 Mich App 613; 741 NW2d 558 (2007), and *People v Watkins*, 277 Mich App 358; 745 NW2d 149 (2007), lv gtd 480 Mich 1167 (2008).

An issue dealing with the admission of evidence is reviewed de novo when it involves a preliminary question of law, such as whether a statute or rule precludes the admissibility of evidence. *Pattison*, *supra* at 615.

MCL 768.27a(1) provides that "in a criminal case in which the defendant is accused of committing a listed

offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." This statute was effective on January 1, 2006, and allows evidence to be admitted that previously may have been inadmissible under MRE 404(b). *Pattison, supra* at 619.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

On the basis of constitutional provisions relating to the separation of powers, "[o]ur Supreme Court has exclusive rulemaking authority with respect to matters of practice and procedure for the administration of our state's courts." *Watkins, supra* at 363. The Legislature may not enact a statute that is purely procedural and relates only to the administration of judicial functions. *Pattison, supra* at 619. The Legislature's enactment of MCL 768.27a does not violate the separation of powers because it is a substantive rule of evidence and "does not principally regulate the operation or administration of the courts." *Pattison, supra* at 619; *Watkins, supra* at 365.

A violation of the Ex Post Facto Clause of the constitution occurs when a law "alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offence in order to convict the offender." *Pattison, supra* at 618, citing *Calder v Bull,* 3 US (3 Dall) 386, 390; 1 L Ed 648

(1798). MCL 768.27a does not violate the Ex Post Facto Clause because the altered standard for admission of evidence does "not lower the quantum of proof or value of the evidence needed to convict a defendant." *Pattison, supra* at 619. While evidence may now be allowed that previously would have been inadmissible under MRE 404(b), the standard for obtaining a conviction has not changed. *Id.*

Defendant also argues that the minimum sentence imposed was too high in light of the language of the second-offense statute and in light of his poor health.

An issue of statutory interpretation is reviewed de novo. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003).

> Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. . . . If the wording or language of a statute is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written. [*People v Hill*, 269 Mich App 505, 514-515; 715 NW2d 301 (2006) (citations omitted).]

Michigan's statute concerning a second or subsequent offender under the criminal sexual conduct portion of the code states that "[i]f a person is convicted of a second or subsequent offense under section 520b, 520c, or 520d the sentence imposed under those sections for the second or subsequent offense shall provide for a mandatory minimum sentence of at least 5 years." MCL 750.520f. That provision applies to convictions where the actor was previously convicted of a criminal sexual offense. MCL 750.520f(2).

A Michigan statute concerning the sentencing guidelines states that "[i]f a statute mandates a minimum

sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section." MCL 769.34(2)(a).

The plain language of the second-offense statute mandates that the minimum sentence for a second offense is to be at least five years. MCL 750.520f. The unambiguous language does not require exactly five years; rather, it states at least five years. The guidelines statute, which requires a trial court to impose a minimum sentence if one is mandated by statute, also states that the minimum sentence shall not exceed 2/3 of the statutory maximum sentence. MCL 769.34(2)(b). The statutory maximum allowed in this case is a term of life. MCL 750.520b(2).

Because defendant's 10-year minimum sentence is "at least" five years, it satisfies the requirements of the second-offense statute. Further, the 10-year minimum sentence does not exceed 2/3 of the statutory maximum life sentence. MCL 769.34(2)(b). The sentence satisfies the requirements of the sentencing guidelines and is not a departure from the recommended minimum range.

Affirmed.

WALGREEN COMPANY v MACOMB TOWNSHIP

Docket No. 276829. Submitted July 2, 2008, at Detroit. Decided July 31, 2008, at 9:10 a.m. Leave to appeal denied, 482 Mich 1187.

The Walgreen Company appealed in the Macomb Township Board of Review the township's 2003 property-tax assessment on realty Walgreen leased from M. Tartaglia, L.L.C. Under a lease agreement covering more than 35 years, Walgreen was entitled to contest the validity of any tax on the leased realty and Tartaglia had to cooperate with Walgreen in any contested proceeding and execute any necessary documents. At the time of the appeal, a board-of-review rule required a petitioner appearing before the board on behalf of a property owner to furnish written authorization from the property owner appointing the petitioner as the owner's agent or representative. Walgreen did not provide such written authorization or any document showing that it had an ownership interest in the realty. The board dismissed Walgreen's appeal for lack of standing, noting that the tax roll showed that Tartaglia was the owner of the realty and that Walgreen had failed to provide written authorization to appear on behalf of Tartaglia. Walgreen appealed to the Tax Tribunal to challenge the board's decision regarding standing to challenge the 2003 assessment and later amended its petition of appeal to include challenges of assessments for tax years 2004, 2005, and 2006, and to move for summary disposition under MCR 2.116(C)(10). The tribunal denied Walgreen's motion and, pursuant to MCR 2.116(I)(2), granted summary disposition for the township instead. Walgreen appealed.

The Court of Appeals *held*:

1. MCL 211.30(4) of the General Property Tax Act, (GPTA) confers on a person whose name appears on an assessment roll, including an owner's agent, standing to challenge a tax assessment. Walgreen, which was not on the assessment roll and did not provide the required notice of authorization to act as Tartaglia's agent, lacks standing.

2. MCL 205.735(3) of the Tax Tribunal Act, which permits parties in interest to petition the Tax Tribunal regarding unlawful

assessments, is not applicable to initial challenges to tax assessments before local boards of review.

3. Walgreen is not the real party in interest under MCR 2.201(B) because it is Tartaglia who was the real party in interest since it was ultimately liable to the township for the taxes.

4. MCL 211.27a(6)(g) of the GPTA, which provides that a "transfer of ownership" for purposes of taxing property includes a conveyance by lease if the lease is for more than 35 years, does not confer standing on Walgreen in view of its failure to provide the township with notice of such a transfer, as required by MCL 211.27a(10).

5. Walgreen has failed to establish that it had standing to challenge the 2004, 2005, and 2006 assessments before the board of review for the same reasons it failed to establish standing with respect to the 2003 assessment.

6. The Tax Tribunal properly granted summary disposition for the township in the absence of Walgreen's standing to appear before the board of review.

Affirmed.

O'CONNELL, J., dissenting, stated that Walgreen has standing because, as the party responsible for paying the taxes at issue, it suffered an injury in fact that is both concrete and particularized, as well as actual and imminent. Walgreen was also the real party in interest under MCR 2.201(B) because the lease agreement gave it the right to contest the validity of any tax. The Walgreen-Tartaglia lease agreement was sufficient written authorization under the board of review's rule for Walgreen to act as Tartaglia's agent before the board of review. That rule is not authorized by the GPTA and is unconstitutional because it violated Walgreen's due-process rights. Walgreen had the right to protest the assessed value of the realty under the plain language of MCL 211.30(4). Walgreen has a property interest in the taxed realty and Walgreen was deprived of that interest without due process of law by virtue of the board of review's rule and the requirement under MCL 205.735(1) that an assessment dispute concerning tax violation of property be protested at the local board of review before the Tax Tribunal can acquire jurisdiction. Judge O'CONNELL would reverse the tribunal's decision.

Honigman Miller Schwartz and Cohn LLP (by *Michael B. Shapiro*, *Stewart L. Mandel*, and *Jason Schian Conti*) for the petitioner.

Seibert and Dloski (by *Lawrence W. Dloski* and *Colleen O'Connor*) for the respondent.

Before: OWENS, P.J., and O'CONNELL and DAVIS, JJ.

DAVIS, J. Petitioner appeals as of right from a Tax Tribunal decision dismissing its appeals of respondent's property tax assessments for tax years 2003, 2004, 2005, and 2006. We affirm.

Petitioner is the lessee of real property in Macomb Township pursuant to a long-term lease that requires it to pay the property taxes for the property. The lease provides that petitioner is entitled to contest the validity of any tax; the property owner must cooperate in any contested proceeding and execute any necessary documents. In March 2002, respondent's board of review adopted a rule under which "[a] person who is filing a petition to appear before the Board of Review, on behalf of a property owner, must furnish written authorization from the property owner appointing them as the agent/representative." On March 1, 2003, petitioner timely filed with respondent's board of review a written appeal and objection to respondent's 2003 tax assessment. Petitioner attached a letter that identified petitioner as the taxpayer and that authorized its designated representative to appear before the board. However, petitioner did not provide any documentation showing that it had an ownership interest in the property or that the property owner had authorized petitioner to appear before the board. The board of review dismissed the appeal for lack of standing: respondent's assessment roll showed that M. Tartaglia,

L.L.C., was the property owner, so without proper authorization,[1] only M. Tartaglia, L.L.C., could challenge the tax assessment for the property.

Petitioner appealed the adverse ruling to the Tax Tribunal. There, petitioner filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that the board of review improperly found that it lacked standing. Specifically, petitioner argued that it had an ownership interest in the property and was a party in interest because it was responsible for paying the property taxes. The hearing referee requested additional information and delayed a decision on that motion several times. In the interim, petitioner was permitted to amend its petition to include challenges to the 2004, 2005, and 2006 tax assessments as well. In December 2006, the hearing referee issued a ruling that petitioner lacked standing to challenge the property tax assessments for each of the tax years. Accordingly, it denied petitioner's motion for summary disposition and granted judgment in favor of respondent pursuant to MCR 2.116(I)(2). This appeal followed.

Our review of a Tax Tribunal decision is very limited. In the absence of fraud, we are limited to deciding whether the tribunal committed an error of law or adopted a wrong legal principle. *Liberty Hill Housing*

[1] The dissent correctly notes that the board of review adopted a more specific policy explicitly requiring a "Letter of Authorization" a few days *after* petitioner filed its appeal. We also recognize that the board of review apparently deemed this policy relevant to its rejection of petitioner's appeal. However, contrary to the suggestion of the dissent, we do not find the later policy of significance here, and we express no view thereon. Again, petitioner did not provide *any* sort of "written authorization from the property owner appointing it as the agent/representative" for the purpose of appearing before the board of review, and that was the basis for the board's rejection. Petitioner did not even tender to the board a copy of the lease as evidence of such authorization, which counsel for respondent conceded at oral argument would have sufficed.

Corp v Livonia, 480 Mich 44, 49; 746 NW2d 282 (2008). Factual findings made by the tribunal will not be disturbed as long as they are supported by competent, material, and substantial evidence on the whole record. *Id*. We review de novo the proper interpretation of statutes and rulings on summary-disposition motions. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). The purpose of statutory interpretation is to discover and give effect to the Legislature's intentions, and unambiguous statutory language should be enforced as written. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). A motion for summary disposition under MCR 2.116(C)(10) should be granted if there is no genuine issue of material fact when the evidence and all reasonable inferences therefrom are viewed in the light most favorable to the nonmoving party; in that circumstance, the moving party is entitled to judgment as a matter of law. *Coblentz*, *supra* at 567-568. Under MCR 2.116(I)(2), the court may enter a judgment in favor of the opposing party if it appears that the opposing party is entitled to judgment.

The parties have stipulated the facts. At issue is whether the Tax Tribunal correctly determined that, on the basis of those facts, petitioner lacked standing to challenge the tax assessments. The concept of standing in the context of a legal proceeding means that a party must have suffered an actual, particularized impairment of a *legally protected* interest, that the opposing party can in some way be shown to be responsible for that impairment, and that a favorable decision by a court could likely redress that impairment. See *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001).

The General Property Tax Act (GPTA), MCL 211.1 *et seq.*, governs proceedings before local boards of review. MCL 211.30 sets forth procedures to be followed when

protesting tax assessments before the board of review. MCL 211.30(4) provides, in relevant part:

> At the request of a person whose property is assessed on the assessment roll or of his or her agent, and if sufficient cause is shown, the board of review shall correct the assessed value or tentative taxable value of the property in a manner that will make the valuation of the property relatively just and proper under this act.

Subsection 3 provides that "[p]ersons or their agents who have appeared to file a protest before the board of review at a scheduled meeting or at a scheduled appointment shall be afforded an opportunity to be heard by the board of review." Subsection 4 further provides that "nonresident taxpayers" may support any such protest by submitting a letter. Subsection 7 permits governing bodies to authorize "resident taxpayers" to submit protests by letter and without personally appearing. Thus, when read as a whole, MCL 211.30 affords "taxpayers" the opportunity to be heard on tax protests, but *only* "a person whose property is assessed on the assessment roll or his or her agent" may actually *make* such a property tax protest before the board of review.

MCL 211.24(1)(a) provides in part that each March, the local assessor shall make and complete an assessment roll and include

> [t]he name and address of every person liable to be taxed in the local tax collecting unit with a full description of all the real property liable to be taxed. If the name of the owner or occupant of any tract or parcel of real property is known, the assessor shall enter the name and address of the owner or occupant opposite to the description of the property. If unknown, the real property described upon the roll shall be assessed as "owner unknown."

MCL 211.24(1)(g) recognizes that property may be assessed in the name of someone other than the owner.

That statute provides that "[p]roperty assessed to a person other than the owner shall be assessed separately from the owner's property and shall show in what capacity it is assessed to that person, whether as agent, guardian, or otherwise." The assessor is required to send notices of the taxes to "each owner or person or persons listed on the assessment roll of the property." MCL 211.24c(1). Similarly, MCL 211.24c(4) provides that "[t]he assessment notice shall be addressed to the owner according to the records of the assessor."

Therefore, it is apparent that respondent's obligation to send the required notices extends to those names that appear on the assessment roll, whether they are the owner or an owner's agent. MCL 211.30(4) is consistent with the notice requirements and confers on any person whose name appears on the assessment roll, including an owner's agent, standing to challenge a tax assessment. In this case, however, petitioner never demonstrated that it took the necessary steps to have its name placed on the assessment roll or to obtain the owner's written authorization to appear before the board of review on behalf of the listed owner. Indeed, the evidence affirmatively shows that petitioner *was not* ever placed on the assessment roll for the parcel at issue in this case; rather, only M. Tartaglia, L.L.C., appeared on the assessment roll.

We disagree with the dissent's conclusion that the plain language of MCL 211.30(4) gives petitioner the right to protest the assessed value of this property. Because petitioner is *not* a "person whose property is assessed on the assessment roll," and because petitioner did not provide the board of review with any indication that it was the agent of a "person whose property is assessed on the assessment roll," the statute does *not* give petitioner any rights. Accordingly, petitioner failed to establish its standing to protest the 2003 tax assessment.

Petitioner next argues that MCL 205.735(3) permits "parties in interest" to petition the Tax Tribunal regarding unlawful assessments, and that statute should be reconciled with MCL 211.30 such that long-term lessees may appeal an assessment. Given the plain language of the statute, we disagree. MCL 205.735(3) is part of the Tax Tribunal Act, MCL 205.701 *et seq*., and it governs the Tax Tribunal's jurisdiction to consider a petitioner's appeal from an adverse decision of a board of review. It is not applicable to initial challenges to tax assessments before boards of review. Similarly, petitioner argues that it is "the real party in interest" under MCR 2.201(B) as "a party having an interest that will assure sincere and vigorous advocacy." *City of Kalamazoo v Richland Twp,* 221 Mich App 531, 534; 562 NW2d 237 (1997). However, although petitioner was liable to the property owner for the property taxes under the terms of its lease, the property owner ultimately remained liable to the township for the payment of taxes. Therefore, the owner was the real party in interest for purposes of challenging the property tax assessment. Most significantly, and as explained previously, the board of review's rules *would* have allowed petitioner to challenge the tax assessment if petitioner had submitted written authorization from the assessed owner.[2]

Petitioner also argues that the Tax Tribunal erred in relying in part on the definition of "taxpayer" in MCL 211.44(10)(c), even though that definition is expressly

[2] The dissent raises the specter that the assessed property owner might, for some reason, refuse to provide that written authorization to a lessee who is responsible for the payment of taxes under the terms of the lease. However, we believe, as did counsel for respondent at oral argument, that submission of the lease itself would constitute "written authorization." We reiterate that we have no occasion here to consider the later, more specific, policy, and we decline in any event to engage in speculation over a situation that the instant case does not factually support.

limited to that statute. Even if the definition in MCL 211.44(10)(c) is not applicable, however, the hearing referee correctly concluded that petitioner lacked standing pursuant to MCL 211.30.

Petitioner alternatively argues that MCL 211.27a(6)(g) establishes its standing as a tenant under a long-term lease that exceeds 35 years. That statute provides that a "transfer of ownership" for purposes of taxing property includes a conveyance by lease if the duration of the lease is more than 35 years. Here, however, petitioner did not present evidence showing that it complied with the notice requirements in MCL 211.27a(10) to provide respondent with notice of the property transfer, and petitioner was not listed on the assessment roll. Accordingly, even if petitioner's lease agreement qualifies as a "transfer of ownership" under MCL 211.27a(6)(g), it does did not establish petitioner's standing pursuant to MCL 211.30.

We do not suggest, as the dissent implies we do, that a long-term lessee like petitioner has *no* interest in the property it leases. But, even if the terms of the lease obligate it to pay the taxes, that does not mean that petitioner has a "legally protected interest" under the GPTA. See *Lee*, *supra* at 739. Petitioner was not "a person whose property is assessed on the assessment roll" or the agent of that person. Rather, the assessment roll showed that another individual was responsible for the taxes. The lease might make petitioner the agent of the person whose property is assessed, but no evidence thereof was submitted to the board of review. Petitioner, as the party seeking the benefit of standing, had the burden of showing standing. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 630-631; 684 NW2d 800 (2004). For all of these reasons, we conclude that the Tax Tribunal did not err in dismissing petition-

er's appeal on the basis that it lacked standing to challenge the 2003 tax assessment before the board of review.

Petitioner also argues that the Tax Tribunal erred in dismissing its additional claims for the 2004, 2005, and 2006 tax years. We disagree. Although MCL 205.737(4) permitted petitioner to join its claims for those tax years with its appeal involving the 2003 tax year, petitioner was still required to establish its standing to challenge the tax assessments for those years before the board of review. Because petitioner failed to establish its standing to challenge the 2004, 2005, and 2006 tax assessments for the same reasons previously discussed relative to the 2003 tax year, those claims were also properly dismissed.

Finally, we find no merit to petitioner's argument that even if the Tax Tribunal did not err in denying its motion for summary disposition, it improperly granted judgment in favor of respondent under MCR 2.116(I)(2). The evidence demonstrates that there was no genuine issue of material fact that petitioner did not have its name placed on the assessment roll, obtain the property owner's written authorization to appear before the board of review on the owner's behalf, or even tender a copy of its lease to the board for the same purpose. Accordingly, the tribunal appropriately determined that petitioner lacked standing to protest the property tax assessments and, accordingly, that respondent was entitled to judgment as a matter of law.[3]

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[3] In its statement of questions presented in its brief on appeal, petitioner lists as Issue V that the Tax Tribunal's "second order constitutes fraud, error of law, the adoption of wrong principles, and/or relies on factual findings not supported by the record." Petitioner does not present any supporting argument for this issue in its brief. Therefore, the issue is abandoned. *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 422; 576 NW2d 667 (1998).

Affirmed.

OWENS, P.J., concurred.

O'CONNELL, J. (*dissenting*). I respectfully dissent. In my opinion, the Tax Tribunal improperly found that petitioner had no standing. Additionally, the rules created by respondent's board of review were invalid and denied petitioner its due-process rights. I would reverse.

Whether a party has standing comprises a question of law that is subject to review de novo. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

> "[T]he doctrine of standing [is] a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." [*Id*. at 735-736, quoting *Lewis v Casey*, 518 US 343, 349; 116 S Ct 2174; 135 L Ed 2d 606 (1996) (citations omitted).]

In *Lee*, our Supreme Court adopted the same test to determine standing as that used by federal courts:

> "[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent

> action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " [*Lee*, *supra* at 739, quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992).]

The "injury in fact" must be "both concrete and particularized, as well as actual and imminent, in order to establish standing." *Rohde v Ann Arbor Pub Schools*, 479 Mich 336, 349; 737 NW2d 158 (2007). Under this standard, petitioner clearly has an "injury in fact," as it is the one responsible for paying the taxes at issue.

Although the majority recognizes petitioner's liability to the owner for the payment of the taxes under the terms of the lease, it dismisses petitioner's argument that it is "the real party in interest" under MCR 2.201(B) on the basis of its conclusion that the owner is the "real party in interest" because it ultimately remains liable to the township for payment of the taxes. "A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *Hoffman v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). The lease explicitly gave petitioner the right to contest the validity of any tax, making petitioner a real party in interest. That the property owner also has an interest does not prevent petitioner from being a real party in interest. " 'Whether additional parties also have an interest, such that their joinder is required or that plaintiff is prohibited from proceeding without them, is not a question of real party in interest, but of necessary joinder under MCR 2.205.' " *Id.* (citations omitted). This Court has previously concluded that a lessee has standing to bring suit on an issue affecting the property. *Central Advertising Co v St Joseph Twp*, 125 Mich App 548, 555; 337 NW2d 15 (1983). The defendant in *Central Advertising Co* had argued that the plaintiff did

not have an adequate property interest under which to establish the lawsuit, but this Court held that the plaintiff as a lessee "has a sufficient interest in the outcome of the litigation to assure sincere and vigorous advocacy." *Id.*

Given that petitioner is the real party in interest pursuant to MCR 2.201(B) and has met the requirements of standing, the Tax Tribunal erred in concluding that petitioner had no standing.

Separate from the question of standing is whether petitioner was authorized by statute to bring its claim before the board of review. See *Rhode*, *supra* at 343-355 (providing separate analyses for the statutory requirements to bring suit and whether the plaintiffs had constitutional standing, and concluding that while the former was met, the latter was not). On March 5, 2002, respondent's board of review adopted the following policy: "A person who is filing a petition to appear before the Board of Review, on behalf of a property owner, must furnish written authorization from the property owner appointing them as the agent/representative." On March 6, 2003, the board of review adopted a more specific policy:

> Resolution adopted requiring a person who is filing a petition to appear before the Board of Review, on behalf of a property owner, must furnish written authorization from the property owner appointing them as the agent/representative. This Resolution was also adopted providing for all *future* petitions submitted by a representative on behalf of the property owner must be submitted with a Letter of Authorization signed by the property owner. The Letter of Authorization must contain the parcel number for the parcel or parcels being protested, a valid legible signature, a valid printed signature and must be original signatures. [Emphasis added.]

Petitioner filed its written appeal with respondent's board of review on March 1, 2003, and included a petition. Because the appeal petition predated the adoption of the March 6, 2003, resolution, I disagree with the majority that it is applicable. The text of the policy itself indicates it is applicable to "future petitions," and petitioner's petition was submitted before its adoption.

Using the 2002 rule, I conclude that petitioner provided sufficient documentation to proceed with its appeal before the board of review. Petitioner had a signed lease expressly permitting it to contest the validity of the property taxes. That document is sufficient to constitute written authorization from the property owner, appointing petitioner as the agent or representative before the board of review. Therefore, I conclude that the board of review erred in concluding that petitioner had no "standing" to protest the taxes.

Indeed, "[t]he right to a hearing by the assessor, sitting as a board of review, is one of which a tax-payer cannot be lawfully deprived." *Village of Three Rivers Common Council v Smith*, 99 Mich 507, 509; 58 NW 481 (1894). A taxpayer is "a person who pays tax or is subject to taxation." *Random House Webster's College Dictionary* (2001). Petitioner, as a person obligated to pay the property taxes in question, was a taxpayer, and the board of review was required to provide petitioner with a hearing.

Additionally, even if the March 6, 2003, policy did apply, I would conclude that it was both invalid, as it was not authorized by the General Property Tax Act (GPTA), MCL 211.1 *et seq.*, and unconstitutional because it violated petitioner's due-process rights.

A rule is invalid when it conflicts with the provisions of the governing statute. *Michigan Sportservice, Inc v Dep't of Revenue Comm'r*, 319 Mich 561, 566; 30 NW2d

281 (1948) ("The provisions of the rule must, of course, be construed in connection with the statute itself. In case of conflict, the latter governs."). In this case, the rule adopted by respondent's board of review places an additional burden on the taxpayer that is not required by the statute. There is no express authority in the GPTA permitting respondent's board of review to exclude those who pay the property taxes from being able to contest them. MCL 211.30(4) provides:

> At the request of a person whose property is assessed on the assessment roll or of his or her agent, and if sufficient cause is shown, the board of review shall correct the assessed value or tentative taxable value of the property in a manner that will make the valuation of the property relatively just and proper under this act.

Leases provide a real-property interest. *Adams Outdoor Advertising v East Lansing* (*After Remand*), 463 Mich 17, 33; 614 NW2d 634 (2000). See also *Forge v Smith*, 458 Mich 198, 206-207; 580 NW2d 876 (1998) (noting that lease contract granted property interest in certain lots); *Thomas v Rex A Wilcox Trust*, 185 Mich App 733, 738; 463 NW2d 190 (1990) ("Oil and gas leases are considered real property interests."); *Central Advertising Co*, *supra* (lessee had an adequate property interest to give it standing to maintain a lawsuit involving a county ordinance affecting the property). Accordingly, under the plain language of MCL 211.30(4), petitioner had the right to protest the assessed value of the property, as petitioner had a property interest in the taxed property as the lessee, making petitioner a "person whose property is assessed." Respondent's board of review created a rule that prevented individuals who were otherwise permitted under the statute to protest the validity of the property tax from being able to do so. Because the statute does not provide them such author-

ity, the rule is invalid and the statute must prevail. *Michigan Sportservice, Inc*, *supra.*

In addition to being invalid, the rule adopted by respondent's board of review is also unconstitutional. Both the United States and Michigan constitutions prevent the taking of property without due process of law. US Const, Am V; Const 1963, art 1, § 17. "The 'property' protected by the constitutions includes not only title, but all character of vested rights, including possession, dominion, control, and the right to make any legitimate use of the premises." *Ligon v Detroit*, 276 Mich App 120, 124-125; 739 NW2d 900 (2007), citing *Rassner v Fed Collateral Society, Inc*, 299 Mich 206, 213-214; 300 NW 45 (1941). Under the majority's reasoning, individuals with property interests in the taxed property (such as lessees) could be obligated to pay property taxes and yet, so long as the property owner listed on the assessment roll refuses to sign the required "Letter of Authorization" to the standards required by the board of review, would never be permitted to contest their tax obligation before the board of review.[1] When coupled with the requirement that an assessment dispute concerning the valuation of property be protested before the local board of review before the Tax Tribunal can acquire jurisdiction, MCL 205.735(1); *Covert Twp v Consumers Power Co*, 217 Mich App 352, 355; 551 NW2d 464 (1996), the rule

[1] That petitioner's lease required the property owner to execute any written documents required to contest the validity of taxes is irrelevant. The property owner could refuse to perform its obligation under the lease, preventing petitioner from ever being able to dispute its tax liability before the board of review. In that event, although petitioner would have a contract claim against the property owner, damages would be difficult or impossible to calculate, because there is no way to determine what the board of review would have decided had petitioner been permitted to appeal the taxes and what effect that would have had on future tax years.

adopted by respondent's board of review and assented to by the majority opinion denies access to the courts to an entire group of individuals with property interests, thereby denying them of property without due process of law.

Because I conclude that petitioner had standing and was permitted to challenge the tax assessment before the board of review, and that the rule implemented by the board of review was both invalid and unconstitutional, I would reverse the decision of the Tax Tribunal.

PEOPLE v EDENSTROM

Docket No. 277291. Submitted June 4, 2008, at Detroit. Decided August 5, 2008, at 9:00 a.m. Leave to appeal sought.

Elizabeth A. Edenstrom was charged in the 27th District Court with violating MCL 333.21771(2), which requires nursing-home administrators to report incidents of abuse, mistreatment, or harmful neglect to state authorities, on the basis of an incident in which a nursing-home resident who was connected to an oxygen tank suffered burns when a certified nursing assistant turned off his oxygen and then lit his cigarette, causing residual oxygen in the delivery tubes to ignite. The district court, Randy L. Kalmbach, J., denied the defendant's motion to dismiss the charge on the grounds that this accident was not within the contemplation of the reporting provision and that the provision does not impose a criminal penalty for its violation. On appeal, the Wayne Circuit Court, Diane M. Hathaway, J., dismissed the charge, ruling that the reporting provision applies only to incidents of willful abuse, mistreatment, or neglect, not to accidents. The prosecution appealed by delayed leave granted.

The Court of Appeals *held*:

1. The phrase "harmfully neglect," as used in MCL 333.21771(1), has acquired a particular and appropriate meaning in the law; therefore, its meaning is properly defined by the agency responsible for the administration of nursing homes rather than by a dictionary. That agency has defined "neglect," including "harmful neglect," to mean a failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness. Neglect need not be willful; rather, an act or omission may constitute neglect if it disregards or violates a specific order, care plan, duty, or right of a resident.

2. The nursing assistant's action of lighting the resident's cigarette did not constitute harmful neglect because she performed the duties that she was assigned to perform in the manner in which she had been trained to perform them. The fact that the nursing home had a poor or improper smoking policy in place at the time of the incident is not relevant to the inquiry.

3. The defendant's failure to report the incident was outside the scope of MCL 333.21771(2) because the nursing assistant's

actions with regard to lighting the resident's cigarette did not constitute harmful neglect within the meaning of the statute. However, the circuit court's interpretation of MCL 333.21771 as requiring an element of willful conduct is rejected, as is the circuit court's holding that this provision does not apply to accidents. Although nursing-home administrators may exercise their judgment regarding whether an incident must be reported, they must report incidents that there is reason to believe were caused by abuse, neglect, or misappropriation.

Affirmed.

ZAHRA, P.J., concurring in part and dissenting in part, agreed that an act of neglect need not be willful in order to require reporting under MCL 333.21771 and that the defendant was not absolved from culpability because she concluded that the incident in question was an accident, but disagreed that the resident's injuries could not constitute harmful neglect merely because a deficient policy had been followed, and also disagreed that the defendant's internal investigation absolved her from the duty to report the incident. He would further hold that a violation of MCL 333.21771 is punishable under MCL 333.1299, and would reverse the circuit court's dismissal order, reinstate the district court's order denying dismissal, and remand for further proceedings.

1. HEALTH — NURSING HOMES — PUBLIC HEALTH CODE — REPORTING REQUIREMENTS — WORDS AND PHRASES — HARMFULLY NEGLECT.

The phrase "harmfully neglect," in the statutory provision that requires nursing-home administrators to report incidents of abuse, mistreatment, or harmful neglect to state authorities, means to fail to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness, either willfully or unintentionally (MCL 333.21771[1]).

2. HEALTH — NURSING HOMES — PUBLIC HEALTH CODE — REPORTING REQUIREMENTS.

Nursing-home administrators must report incidents that there is reason to believe were caused by abuse, harmful neglect, or misappropriation (MCL 333.21771[2]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Scott L. Teter* and *Thomas S. Marks*, Assistant Attorneys General, for the people.

Kerr, Russell and Weber, PLC (by *Robert E. Forrest*), for the defendant.

Before: ZAHRA, P.J., and CAVANAGH and JANSEN, JJ.

CAVANAGH, J. The prosecution appeals by delayed leave granted an order dismissing its complaint charging defendant with violating MCL 333.21771(2), which requires a nursing-home administrator to report certain incidents to state authorities. We affirm.

On December 18, 2004, William Devine, an oxygen-dependent resident of Rivergate Health Care Center, suffered burns while attempting to smoke a cigarette. Devine was in a designated smoking area of the nursing home and was wearing a device called a "nasal cannula," which delivered oxygen to his nose through tubing that was connected to an oxygen tank. The certified nursing assistant who was helping him turned off the oxygen supply and proceeded to light Devine's cigarette. Residual oxygen in the tubing ignited, causing Devine to suffer burns on his hands and face, as well as smoke inhalation. The nursing assistant later indicated that she did not know that nasal cannula tubing could contain oxygen after the oxygen tank was turned off.

Pursuant to MCL 333.21771, a nursing-home administrator is required to report to state authorities any physical, mental, or emotional abuse, mistreatment, or harmful neglect of a patient. Here, Rivergate's administrator—defendant—conducted an investigation into the incident and concluded that the incident was an "accident" and, thus, reporting was not required under the statute. A member of Devine's family, however, reported the incident to state authorities and an investigation followed.

Defendant was subsequently charged with the misdemeanor offense of failing to report the incident to state authorities as required by MCL 333.21771(2). Defendant moved to dismiss the charge, arguing that

(1) this "accident" was not within the contemplation of the statute's reporting requirements, and (2) the statute does not impose a criminal penalty. The prosecution countered that (1) the circumstances showed, at least, recklessness that warranted reporting, and (2) the statutory "catch-all" provision provided that violations of the Public Health Code for which a penalty is not otherwise provided are punishable as misdemeanors. The district court agreed with the prosecution and denied defendant's motion to dismiss.

Defendant appealed to the circuit court. The same arguments were presented. The court agreed with defendant, holding:

> This Court has reviewed the issues presented de novo. And section 21771(1) states that, "A licensee, nursing home administrator or employee of a nursing home shall not physically, mentally or emotionally abuse, mistreat or harmfully neglect a patient."
>
> This Court is adopting appellant's argument. This Court believes that the reporting statute applies only to one's awareness of willful abuse, mistreatment or neglect, not to accidents.
>
> This Court cannot expand the definition of the conduct, which constitutes a crime, because criminal statutes must be strictly construed under Michigan laws.
>
> Since this Court believes that the accident that occurred here was not meant to be considered harmful neglect or abuse and neglect [sic] reporting purposes, this Court feels that reporting was not required under the circumstances. Therefore, this Court is reversing the order entered by the Twenty-seventh District Court denying [defendant's] motion to dismiss the complaint. This Court rules in favor of the appellant.

A delayed application for leave to appeal followed, and was granted. See *People v Edenstrom*, unpublished order of the Court of Appeals, entered August 16, 2007 (Docket No. 277291).

The prosecution argues on appeal that the circuit court misconstrued MCL 333.21771, reading into it a "willful" element that is not required by the statute. We review de novo this issue of statutory interpretation. *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 9; 654 NW2d 610 (2002).

MCL 333.21771 provides:

> (1) A licensee, nursing home administrator, or employee of a nursing home shall not physically, mentally, or emotionally abuse, mistreat, or harmfully neglect a patient.
>
> (2) A nursing home employee who becomes aware of an act prohibited by this section immediately shall report the matter to the nursing home administrator or nursing director. A nursing home administrator or nursing director who becomes aware of an act prohibited by this section immediately shall report the matter by telephone to the department of public health, which in turn shall notify the department of social services.

The issue here is whether defendant, as a nursing-home administrator, was required to report the incident involving Devine. MCL 333.21771(2) requires the nursing-home administrator to report "an act prohibited by this section immediately . . . ." The acts prohibited by the section are physical, mental, or emotional abuse, mistreatment, and harmful neglect of a nursing home patient. MCL 333.21771(1). The prosecution contends that the nursing assistant's conduct with regard to Devine constituted harmful neglect within the contemplation of the statute; thus, the nursing-home administrator—defendant—was required to immediately report the matter.

Whether a defendant's alleged conduct falls within the scope of a statute presents a question of law that is reviewed de novo. See *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991); *People v Rutledge*, 250 Mich

App 1, 4; 645 NW2d 333 (2002). In reviewing questions of statutory construction, our purpose is to discern and give effect to the Legislature's intent. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). We first turn to the plain language of the statute; if the language is unambiguous, no judicial construction is required or permitted and the statute must be enforced as written. *Id*., quoting *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). And, pursuant to MCL 8.3a,

> [a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

The phrase "harmfully neglect" is not defined by MCL 333.21771. The prosecution urges us to adopt dictionary definitions of the words. If the legislative intent cannot be determined from the statute itself, a court may consult dictionary definitions for guidance in determining the plain and ordinary meaning of words, i.e., "the common and approved usage of the language." MCL 8.3a; see, also, *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Were we to agree with the prosecution, we would turn to the dictionary definition of "neglect" and find that its definitions include: "1. to pay no attention or too little attention to; disregard or slight. 2. to be remiss in the care of . . . . 3. to omit, as through indifference or carelessness . . . . 4. to fail to carry out or perform . . . ." *Random House Webster's College Dictionary* (2000).

But our inclination is to agree with defendant that the phrase "harmfully neglect," as it is used in MCL 333.21771(1), has acquired a peculiar and appropriate

meaning in the law. That meaning has been prescribed primarily by the Department of Community Health,[1] the entity generally responsible for the administration of nursing homes. MCL 333.21741(1) provides: "The department of public health, after seeking advice and consultation from the department of social services, appropriate consumer and professional organizations, and concerned agencies, shall promulgate rules to implement and administer this part."

The "part" referred to in MCL 333.21741(1) is part 217, which pertains to nursing homes. MCL 333.21771 is obviously a section within part 217. In an apparent effort to accomplish the delegated task, the Bureau of Health Systems (bureau) compiled a complaint investigation manual for long-term-care complaints and facility-reported incidents called the "Complaint and Facility Reported Incident Manual." Recognizing that pertinent terms—like abuse, mistreat, and neglect—are used but not defined by the applicable statutes, § 3300 of the manual "sets forth definitions that meet the intent of these multiple legal bases."

Section 3320 of the manual states as follows:

> *Neglect* means failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness. The source of this definition is 42 CFR 488.301. The Public Health Code does not define the term *harmfully neglect* used in 21771(1). By definition, neglect is harmful, so the federal definition is adopted for both state and federal purposes.
>
> Please note that by definition a particular event is either abuse or neglect, not both.
>
> Basically, neglect involves the failure of a staff person to carry out his/her duties in regard to a resident. In theory, any failure to provide required services of any kind for any

[1] Formerly known as the Department of Public Health.

> reason could be considered neglect. However, citations for neglect are normally issued only in cases where there is significant actual harm resulting from a failure to act in the presence of the knowledge of what should be done and the capability to provide the required services. Such cases may include a failure to follow a standard of practice. Even if neglect is not cited, citations are issued against the facility for the specific care issues involved.

It is well settled that agencies are allowed "to interpret the statutes they are bound to administer and enforce." *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 240; 501 NW2d 88 (1993). And this proffered definition and explanation is not only consistent with the dictionary definition; it is also consistent with the definition of "neglect" under the Social Welfare Act, MCL 400.11 *et seq*., which states, in part, that "[n]eglect includes the failure to provide adequate food, clothing, shelter, or medical care." MCL 400.11(d).

Defendant, as the nursing home's administrator, was required to follow the rules promulgated by the bureau as set forth in its manual. Thus, she was to immediately report any instance of harmful neglect. Defendant's investigation into the Devine incident revealed that the nursing assistant lit Devine's cigarette not knowing that oxygen could remain in the nasal cannula tubing after the oxygen tank had been turned off. Defendant concluded that the incident was an accident. According to defendant's interpretation of the reporting provision of the manual, this incident was not reportable because it was not the result of a willful failure to provide treatment. Defendant understood that "harmful neglect" meant knowing or intentional neglect as it relates to medical treatment, not accidents. Thus, defendant did not report this incident under MCL 333.21771(2).

First, we consider defendant's conclusion that the nursing assistant's conduct did not constitute harmful

neglect. All the record evidence indicates that the nursing assistant turned off the oxygen tank and then lit Devine's cigarette. She did not remove Devine's nasal cannula before doing so because she did not know that oxygen could remain in the nasal cannula tubing after the oxygen tank had been turned off. The evidence also reveals that the nursing assistant followed the smoking policy that was in place at the time, which did not include the removal of nasal cannula before lighting a resident's cigarette. And there is no evidence that the facility instructed the nursing assistant regarding patients who wished to smoke while receiving oxygen therapy or wearing a nasal cannula. In other words, the nursing assistant did not fail to carry out her duties in regard to Devine; she did what she knew to do. She did not fail "to act in the presence of the knowledge of what should be done and the capability to provide the required service." The evidence clearly showed that the nursing assistant did not harmfully neglect Devine as that phrase is used in the statutory provision.

This conclusion is buttressed by the provisions in the manual that explain what is meant by "neglect." Section 3320 of the manual states:

> • A resident has been neglected whenever all of the following conditions are satisfied:
>
> ▸ The facility fails to provide or arrange for medical, dental, nursing, dietary, physical therapy, pharmacy, habilitation, psychological, speech, audiological or other treatments or services to the resident in question; and
>
> ▸ The facility's failure to provide these treatments or services is either intentional or the result of carelessness; and
>
> ▸ The failure to provide these treatments or services, results in a deterioration of the resident's physical, mental or emotional condition.

• Examples of Neglect:

The following actions or omissions constitute neglect whenever they result in a noticeable deterioration of the resident's physical, mental or emotional condition:

▸ Failure to carry out a physician's order . . . .

▸ Failure to carry out nursing, treatment or individual resident care plans.

▸ Failure to notify a resident's attending physician and other responsible persons in the event of an incident involving that resident.

▸ Failure to notify a resident's attending physician and other responsible persons in the event of a significant change in that resident's physical, mental or emotional condition.

▸ Failure to provide an adequate number of nutritionally balanced, properly prepared and medically appropriate meals.

▸ Failure to adequately supervise the whereabouts and/or activities of a resident.

▸ Failure to take precautionary measures that have been ordered . . . .

▸ Refusal or failure to provide any service to the resident for the purpose of punishing, disciplining or retaliation.

▸ Allowing the physical environment to deteriorate . . . .

▸ Leaving a resident lying in feces or urine soaked linens for an extended period of time.

▸ Leaving a resident restrained in other than an immediate emergency, without a physician's order, solely for an employee's own convenience.

The examples of neglect cited in the manual persuade us that the neglect need not be willful, as defendant argues and the circuit court appeared to conclude. To the contrary, the neglect can be unintentional. The act or omission may be, for example, in disregard or in violation of specific orders or care plans, a duty, or a

resident's rights. The situations cited in the manual are not exhaustive; they are merely "examples." The focus of the inquiry is on the act or omission, as well as the surrounding circumstances—a point made more clear with an example.

A resident lies in urine-soaked bed linens for seven hours and a severe pressure ulcer develops. The nursing assistant merely got busy and lost track of time. She knew that leaving a resident in that condition was unacceptable and she did not intend to do it. It just happened. It was an accident. The nursing assistant's conduct constituted harmful neglect, reportable under MCL 333.21771(2). In contrast, in this case the nursing assistant's action did not constitute harmful neglect—she performed the duties she was assigned to perform, in the manner that she was trained to perform them. Contrary to the dissenting opinion, that the nursing home had a poor or improper smoking policy in place at the time of this incident does not change our opinion with respect to the nursing assistant's own actions. We believe that "the negligence of the Rivergate Care Center," as it is referred to by the dissent, is a different issue than the one before us, i.e., what constitutes "harmful neglect" by a nursing-home employee. Thus, we agree with defendant's conclusion on this issue, although we reject defendant's reasoning.

Second, we turn to defendant's decision not to report this incident. This action against defendant resulted from her failure to report this incident to state authorities as mandated by MCL 333.21771(2). Section 3410 of the manual sets forth the bureau's interpretation of that statute as follows:

> Section 21771 requires *immediate* reporting when the facility becomes *aware of a prohibited act*. The federal requirement requires reporting *alleged* violations. In both

cases the facility must first screen incidents, observations, and other problematic or unusual events reported by employees to determine if they potentially involve any alleged acts, which could meet the definition of abuse if they were substantiated. The facility must investigate the alleged act or incident. The facility must make a preliminary judgment regarding the likely credibility of a reported incident, i.e., abuse, neglect, or misappropriation and immediately report abuse, neglect, or misappropriation. Only reports that meet these tests need to be reported.

Section 5241 of the manual sets forth the bureau's rules related to the investigation of incidents as follows:

Each long term care facility must review any and all situations or incidents in which a resident may have suffered physical or other harm for reasons which are unknown, unclear or not adequately explained. If, during the course of that review, the facility finds reason to believe that abuse, neglect, or misappropriation was or is suspected to have been the cause of that harm, the incident must be reported to the Bureau.

A nursing home administrator or nursing director is first expected to immediately conduct a thorough in-house investigation to determine what happened and do the following:

• If it is determined by a conclusive investigation that the incident did not occur or was not abuse, neglect, or misappropriation, a detailed incident report and the investigation findings must be filed in the facility. It is not necessary to notify the Bureau in those cases.

• If it is determined that the abusive practices did occur or are still suspected then the nursing home is required to notify the Bureau as described below.

Section 5243 of the manual states:

Incidents do not need to be reported to the Bureau if it is determined by a conclusive facility investigation that the incident did not occur or was not abuse, neglect, or misappropriation. A detailed incident report and the investiga-

> tion findings must be filed in the facility for potential review by Bureau surveyors at surveys or other visits.

Again, Section 5272 of the manual provides:

> The Bureau cites facilities that fail to report immediately (as defined above) even if they voluntarily report later.
>
> **EXCEPTION**: As noted above, facilities which conduct a thorough in-house investigation and determine that the incident was not abuse, neglect, or misappropriation are required to maintain a detailed report or accident report on file in the facility and it is not necessary to notify the Bureau. If investigation determines that the incident was in fact abuse, neglect, or misappropriation, the facility is not cited by the Bureau for failure to report if it is determined that the facility conducted a thorough investigation and made a good faith, informed judgment that the incident was not abuse, neglect, or misappropriation.

Here, defendant contends that she did not report this incident to the bureau because her conclusive investigation resulted in a good-faith determination that the incident was *not* abuse, neglect, or misappropriation—it was an accident. As discussed earlier, we agree with defendant that the incident did not constitute harmful neglect for which reporting was required under MCL 333.21771(2). We also agree with defendant that the manual clearly requires that the nursing-home administrator exercise judgment in determining whether an incident must be reported—not all incidents that result in harm or injury to a resident are required to be reported immediately to the bureau. The manual repeatedly makes that clear. Thus, we disagree with our dissenting colleague's position that the nursing-home administrator must immediately report, without the benefit of any investigation, any and all incidents that occur in a nursing home.

However, we reject defendant's suggestion, as well as the circuit court's apparent conclusion, that those incidents that can be characterized as "accidents" need not be reported. The term "accident" is too subjective and nebulous. So-called "accidents" that may be the result of harmful neglect as set forth in the manual are to be reported immediately. We also reject defendant's claim that only if she "became aware of outright physical, mental or emotional abuse, mistreatment or harmful neglect is the statute's reporting requirement triggered." The term "outright" implies an element of absolute knowledge of prohibited behavior that is not consistent with the manual's reporting requirement. To the contrary, § 5241 of the manual states that if there is "reason to believe that abuse, neglect, or misappropriation was or is suspected to have been the cause of that harm, the incident must be reported to the Bureau." Accordingly, the bureau has interpreted the reporting requirement of MCL 333.21771(2) broadly, which is consistent with sound public policy—overreporting is more desirable than underreporting.

In summary, in light of the facts and circumstances, defendant's conduct—her failure to report the incident—did not fall within the scope of MCL 333.21771(2). See *Thomas*, *supra*. It is clear that the nursing assistant's act or omission with regard to the lighting of Devine's cigarette did not constitute harmful neglect within the contemplation of the statute. Thus, we affirm the circuit court's dismissal of this action. To the extent the circuit court interpreted MCL 333.21771 to contain a "willful" element, that interpretation is rejected, as is the circuit court's holding that this reporting statute does not apply to "accidents." In light of our resolution of this issue, we need not consider whether a violation of MCL 333.21771(2) is punishable under MCL 333.1299.

Affirmed.

JANSEN, J., concurred.

ZAHRA, P.J. *(concurring in part and dissenting in part)*. I concur in the majority's conclusion that an act of neglect need not be willful in order to be reportable under MCL 333.21771. I also concur in the majority's conclusion that defendant is not absolved from culpability under MCL 333.21771 merely because she concluded that the incident here at issue was an "accident." However, I dissent from the majority's conclusion that the injury sustained by William Devine was not the result of "harmful neglect" merely because the employee providing care to the injured patient "performed the duties she was assigned to perform, in the manner that she was trained to perform them." In my opinion, the fact that an employee followed a deficient and hazardous policy to assist oxygen-dependent patients to smoke does not abate the negligence of the Rivergate Health Care Center, which created this policy, nor does it relieve defendant of her duty to report this incident under MCL 333.21771.

I also dissent from the majority's conclusion that defendant is absolved from the duty to report under MCL 333.21771 because her decision not to report the incident was based on her postincident investigation. The statute makes it very clear that an administrator must immediately report instances of harmful neglect to the Department of Community Health, previously the Department of Public Health. An administrator who chooses not to report on the basis of his or her postincident investigation runs the risk that a decision not to report will be reviewed by law-enforcement authorities. This statute is written to encourage over-reporting of possible violations of the Public Health

Code. Requiring nursing-home administrators to report incidents that may rise to the level of abuse, mistreatments, or neglect as soon as they become aware of the incidents is more in line with the statute's language and intention than, as the majority seems to do here, unilaterally allowing an administrator to decide whether an incident is reportable, after conducting an internal investigation. See, generally, *People v Gubachy*, 272 Mich App 706, 710; 728 NW2d 891 (2006) (the court must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose).

Finally, although not addressed in the majority opinion, I conclude that defendant's argument that the statute does not provide a penalty for a violation of MCL 333.21771(2) is without merit. I conclude that the plain language of MCL 333.1299 provides that violations of the Public Health Code are punishable as misdemeanors. The statute does not specifically criminalize a failure to report, although a different statute criminalizes violations of two of the other subsections of the statute. See MCL 333.21771(2); MCL 333.21799c(1)(e) (providing that violations of MCL 333.21771[1] and MCL 333.21771[6] constitute misdemeanors punishable by up to one year in prison, a fine of between $1,000 and $10,000, or both). Nonetheless, the catchall provision of the Public Health Code applies here. The catchall provision states:

> (1) A person who violates a provision of this code for which a penalty is not otherwise provided is guilty of a misdemeanor.
>
> (2) A prosecuting attorney having jurisdiction and the attorney general knowing of a violation of this code, a rule promulgated under this code, or a local health department

> regulation the violation of which is punishable by a criminal penalty may prosecute the violator. [MCL 333.1299.]

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The Legislature is presumed to have intended the meaning it plainly expressed. *People v Petty*, 469 Mich 108, 114; 665 NW2d 443 (2003). Clear statutory language must be enforced as written. *People v Gillis*, 474 Mich 105, 115; 712 NW2d 419 (2006). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004).

The plain and ordinary meaning of the language of MCL 333.1299 is clear, and judicial construction is not necessary. See *Weeder, supra*. MCL 333.1299(1) clearly states that a person who violates a section of the Public Health Code for which a penalty has not been provided is guilty of a misdemeanor. This language is not ambiguous, and this statute should be enforced as written.

I would reverse the order of dismissal granted by the circuit court, reinstate the order denying dismissal issued by the district court, and remand for further proceedings.

JAMIL v JAHAN

Docket No. 281062. Submitted April 2, 2008, at Detroit. Decided August 7, 2008, at 9:00 a.m.

Plaintiff, Hasan M. Jamil, and defendant, Nusrat Jahan, were divorced in Mississippi and were granted joint physical and legal custody of their minor children. The plaintiff then moved to Michigan, and the defendant moved to Virginia. In a Virginia district court, the defendant registered the custody order and sought to modify the order. Following communication between the Virginia and Mississippi courts, the Mississippi court entered an order of dismissal, stating that the Mississippi court no longer had exclusive, continuing jurisdiction because neither the children nor any parent currently resided in Mississippi or had a substantial connection to that state. The Mississippi court also indicated that Virginia would be a more convenient forum for the custody determination. The Virginia court, noting that Mississippi had declined to exercise jurisdiction, entered a custody order that stated that the Virginia court was assuming jurisdiction and that ordered the Mississippi decree determining custody and jurisdiction to be registered in Virginia. Following further proceedings, the Virginia court entered a consent order regarding child custody. Both parties filed notices of appeal in a Virginia circuit court. The defendant then filed a motion for voluntary nonsuit in the Virginia circuit court, requesting dismissal of her motion to amend the custody order. The Virginia circuit court entered a final order granting the defendant's motion for voluntary nonsuit. The next day, the defendant filed a petition in the Virginia district court to enforce the divorce decree. The plaintiff then filed in the Wayne Circuit Court a complaint for modification of the custody and parenting-time provisions of the foreign court order pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*. The defendant moved to dismiss the action in Michigan for the lack of jurisdiction. The court, Lita Masini Popke, J., dismissed the complaint without prejudice, ruling that the Virginia court had jurisdiction under the UCCJEA. The plaintiff then filed a motion for *nunc pro tunc* reinstatement of his complaint, alleging that the Virginia Court of Appeals had recently held that a nonsuit of a case has the effect of nullifying the

entire suit as if it had never existed and, therefore, no action was pending in Virginia. The Virginia court then entered an order dismissing without prejudice the defendant's petition to enforce the divorce decree. The Virginia court also held that its earlier order assuming jurisdiction and registering the Mississippi decree remained in full force. The defendant then moved in the Virginia court for modification of custody. The Wayne Circuit Court then denied the plaintiff's motion to reinstate his complaint, ruling that the Virginia court still retained jurisdiction. The plaintiff appealed as of right in the Court of Appeals.

The Court of Appeals *held*:

1. The Wayne Circuit Court has jurisdiction under MCL 722.1201(1)(a) to make an initial child-custody determination because the children resided with the plaintiff in Michigan for approximately two years before the commencement of this suit.

2. The mere registration of the custody decree in Virginia and the waiver of jurisdiction by Mississippi is not a child-custody determination.

3. The Wayne Circuit Court did not err in declining to exercise jurisdiction to modify the custody order. MCL 722.1203(a) does not grant the Wayne Circuit Court jurisdiction to modify the order because the Virginia court has determined that the nonsuit did not affect the Virginia court's jurisdiction.

Affirmed.

Judith A. Curtis for the plaintiff.

Mark Granzotto, P.C. (by *Mark Granzotto*), for the defendant.

Before: ZAHRA, P.J., and WHITBECK and BECKERING, JJ.

ZAHRA, P.J. Plaintiff appeals as of right an order denying his motion to reinstate custody proceedings in Michigan. The central question presented in this case is whether the Wayne Circuit Court (the Michigan court) abused its discretion by declining jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., to modify a foreign custody decree. Because jurisdiction under the

UCCJEA at one time was vested in a Virginia court and the Virginia court expressly determined that it did not relinquish jurisdiction, we hold that the Michigan court did not abuse its discretion by declining to exercise jurisdiction to modify the foreign custody order. We affirm.

I. BASIC FACTS AND PROCEEDINGS

Plaintiff and defendant were married on August 2, 1991, and had two children. On November 6, 2003, a Mississippi court entered a final divorce decree between the parties. The decree provided that the parties would have joint physical and legal custody of the children, as follows:

> a. The children will be in the custody of the wife from May 16, 2003 through May 15, 2005. They will return to the Husband on May 16, 2005, or the end of the children's school year, whichever occurs later, and remain with the husband until May 15, 2007, or the end of the children's school year, whichever occurs later and te [sic] cycle will then alternate.
>
> b. The children shall spend each summer from the Saturday following the end of the school year until the Saturday before school resumes for the fall with the parent who did not have the children during the previous school year. During custody [sic] the children with one parent, generous access to the other parent will be provided without any reservation or obstacle.

Both parties subsequently moved to other states. Plaintiff ultimately settled in Michigan, and defendant moved to Virginia in December 2004. The parties adhered to the custody order, however, on May 5, 2005, defendant filed to register the custody order in Virginia and to modify the custody order. She specifically sought to modify the custody order to allow the children to spend the school year with her and summers with plaintiff.

The Virginia and Mississippi courts apparently communicated, and on June 21, 2005, the Mississippi court entered an order of dismissal, stating that the Mississippi court no longer had exclusive, continuing jurisdiction over the matter because neither the children nor either parent currently resided in Mississippi, nor did they have a substantial connection to the state. The order also indicated that the state of Virginia would be a more convenient forum for the custody determination. Accordingly, on July 18, 2005, the Virginia district court entered a custody order, which noted that the Mississippi court had declined to exercise jurisdiction. The order further stated that the Virginia district court was assuming jurisdiction, and "order[ed] to be registered the Mississippi decree determining custody and jurisdiction."

After further proceedings on the custody issue, on April 10, 2006, the Virginia district court entered a consent order granting both parties joint legal custody of the children, but granting plaintiff primary physical custody of the children until the end of the 2006-2007 school year, while allowing defendant "liberal time with the children, including long weekends, extended holiday/break times, and the summer of 2006." The order also provided that "[p]rior to the conclusion of the 2006/2007 school year, the parties shall attempt to relocate either to Michigan (Jahan) or Virginia (Jamil)." The order further provided that defendant would have physical custody of the children at the end of the 2006-2007 school year, and that, during the summer of 2007, the parties would attempt to "resolve the issue of with whom the children should live." Finally, the order provided that if no agreement could be reached, the "current arrangement of two years with each parent shall continue for another two years, to be re-evaluated at the conclusion of the 2008/2009 school

year upon either party's motion." Both parties then filed notices of appeal in the Virginia circuit court.

However, in November 2006, defendant filed a motion for voluntary nonsuit in the Virginia circuit court, requesting dismissal of her motion to amend the custody order. On April 5, 2007, the Virginia circuit court entered a final order granting defendant's motion. In doing so, the Virginia court observed that, because plaintiff did not file a counterclaim, defendant had an absolute right to a nonsuit pursuant to Virginia statute. It thus ordered the matter removed from the Virginia court's docket. Despite this dismissal, on April 6, 2007, defendant filed a petition to enforce the divorce decree in the Virginia district court.

On April 27, 2007, plaintiff filed an amended complaint for modification of the custody and parenting-time provisions of the foreign court order pursuant to the UCCJEA in the Michigan court. He asserted that the Michigan court had jurisdiction and should determine the modification of custody and parenting time. He further argued that the contemplated move of the children from Michigan to Virginia was a sufficient change of circumstances to warrant modification of a custody order. More specifically, plaintiff asked the Michigan court to modify the divorce decree to "continue the established custodial environment the children have had and enjoyed for the last two (2) years in Michigan." He asked the Michigan court to accept jurisdiction, issue an order stating that it had temporary emergency jurisdiction, and communicate with the Virginia district court to determine whether Michigan was the most appropriate forum. Also, on May 15, 2007, plaintiff filed in the Virginia court a motion noting that there was a case pending in Michigan and challenging the Virginia court's jurisdiction.

On May 31, 2007, defendant filed a motion to dismiss for lack of jurisdiction in the Michigan court. She argued that the Michigan court was not permitted to exercise jurisdiction because a child-custody proceeding had been commenced in Virginia that had not been terminated or stayed. She thus requested that the Michigan court dismiss plaintiff's complaint for modification, or, in the alternative, stay the proceedings pending a determination by the two courts regarding which court would assume jurisdiction of the matter. On June 13, 2007, the Virginia court entered an order scheduling a hearing regarding jurisdiction for August 31, 2007.

On June 25, 2007, plaintiff filed with the Michigan court a response to defendant's motion to dismiss for lack of jurisdiction. Plaintiff essentially argued that, because of the nonsuit, the only pending action for modification was in Michigan, the state where the children had resided for the past two years. Plaintiff asked the Michigan court to "immediately communicate with [the Virginia district court] so that a determination can be made that Michigan is the most convenient forum under the UCCJEA; and that Virginia acknowledge that it has no continuing jurisdiction under the UCCJEA."

On July 16, 2007, the Michigan court held a hearing on defendant's motion to dismiss for lack of jurisdiction. On the record, the Michigan court stated that because there was a prior custody order in Virginia within the meaning of MCL 722.1206, Virginia had jurisdiction to amend the custody order. The Michigan court also stated that it had contacted the Virginia district judge, and the judge communicated his belief that Virginia had jurisdiction and that Virginia would likely retain jurisdiction. Thus, on July 23, 2007, the Michigan court

entered an order dismissing plaintiff's complaint without prejudice and without costs. The order stated that Virginia had jurisdiction under the UCCJEA, but noted that plaintiff could bring a forum non conveniens motion before the Virginia district court arguing that Michigan was the appropriate forum.

On August 7, 2007, plaintiff filed a motion in the Michigan court for *nunc pro tunc* reinstatement of his complaint for modification of custody. He asserted that, after the Michigan court entered the order of dismissal, the Virginia Court of Appeals issued a published opinion holding that "a non-suit of a case in the Circuit Court which had been appealed from the Juvenile and Domestic Relations District Court has the effect to 'nullify the entire suit as if it had never existed in either Court.' " He argued that, because of that decision, there was no action pending in Virginia because of defendant's voluntary nonsuit. Noting the Michigan court's ruling that it would reconsider reinstatement if the Virginia courts declined jurisdiction, plaintiff requested that the reinstatement "be nunc pro tunc to April and effective forthwith upon pronouncement by the Virginia Court, as being in furtherance of the best interest of the children."

On August 31, 2007, the Virginia district court entered an order dismissing "the petitions to enforce." It reasoned that, because the consent order was nullified by the April 5, 2007, nonsuit ordered on defendant's motion, there was no order for defendant to petition to enforce. However, the Virginia district court also held that its July 18, 2005, order assuming jurisdiction and registering the Mississippi decree in Virginia remained in force. It reasoned, "It would be an empty academic exercise for this Court to hold that the nullification of the consent order also affects the jurisdictional orders,

particularly when considering that the Mississippi Court will no longer retain jurisdiction." The Virginia district court accordingly dismissed without prejudice defendant's petition to enforce and granted the parties leave to pursue custody modification within 20 days. Defendant apparently filed a motion for modification of custody in Virginia after the August 31, 2007, ruling by the Virginia district court.

On September 14, 2007, the Michigan court held a hearing on plaintiff's motion for reinstatement. Defendant argued that a decision on the motion was premature because it was for the Virginia court to determine whether it retained jurisdiction and a forum non conveniens motion filed in Virginia had not yet been decided. On the basis of the language of the Virginia district court's order of August 31, 2007, the Michigan court concluded that the Virginia district court was still asserting jurisdiction over the case. The Michigan court observed that the Virginia district court concluded that the consent order of April 10, 2007, was nullified but that the Virginia district court's jurisdictional claim was not nullified. Accordingly, the Michigan court entered an order, dated September 14, 2007, denying plaintiff's motion to reinstate.

On October 15, 2007, plaintiff filed a claim of appeal in this Court, and on January 1, 2008, the Virginia district court entered an order denying plaintiff's plea in bar and determining the Virginia district court to be the most convenient forum.

II. JURISDICTION

A. STANDARD OF REVIEW

The question whether a court has subject-matter jurisdiction to hear a particular claim is a question of

law that we review de novo. However, the determination whether to exercise jurisdiction under the UCCJEA is within the discretion of the trial court and will not be reversed absent an abuse of that discretion. *Young v Punturo* (*On Reconsideration*), 270 Mich App 553, 560; 718 NW2d 366 (2006). Generally, an appellate court should defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The abuse of discretion standard acknowledges that there are circumstances in which there is no one correct outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

B. ANALYSIS

At the time this dispute arose, Michigan, Mississippi, and Virginia had adopted the UCCJEA. MCL 722.1101 *et seq.*; Miss Code Ann 93-27-101 *et seq.*; Va Code Ann 20-146.1 *et seq*.

It is clear that Michigan courts have jurisdiction to make an initial custody determination. Under MCL 722.1201(1), the Michigan court has jurisdiction to make an initial child-custody determination, if:

> (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

Here, the children resided with plaintiff in Michigan for approximately two years before the commencement of this suit. Accordingly, under MCL 722.1201(1)(a) the Michigan court has jurisdiction to make an initial child-custody determination.

Less clear is whether the facts presented in this case permit a Michigan court to exercise jurisdiction to *modify* the custody order originally entered in Mississippi and registered in Virginia. MCL 722.1203 addresses the Michigan court's jurisdiction to modify the custody order and provides in relevant part that

> a court of this state shall not modify a child-custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial child-custody determination under section 201(1)(a) or (b) and either of the following applies:
>
> (a) The court of the other state determines it no longer has exclusive, continuing jurisdiction under section 202 or that a court of this state would be a more convenient forum under section 207.
>
> (b) A court of this state or a court of the other state determines that neither the child, nor a parent of the child, nor a person acting as a parent presently resides in the other state.

As mentioned, the Michigan court has jurisdiction to make an initial child-custody determination under section MCL 722.1201(1)(a). Thus, if either MCL 722.1203(a) or (b) is met, a Michigan court can exercise jurisdiction to modify the current custody order. Because one parent resides in Michigan and the other in Virginia, MCL 722.1203(b) does not apply. Therefore, a Michigan court has jurisdiction to modify the existing custody order only if MCL 722.1203(a) applies.

The parties' dispute centers on the status of the Virginia custody action. Plaintiff maintains that because the Virginia action is void *ab initio*, Virginia never had a basis for jurisdiction. Defendant ceded at oral argument that the Virginia court never issued a valid custody order. However, defendant asserted that "the registration of the prior Mississippi decree in Virginia,

when combined with the Mississippi court's relinquishment of jurisdiction, renders that document a 'child-custody' determination of the Virginia Court . . . ." We disagree with defendant's assertion.

> "Child-custody determination" means a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child. Child-custody determination includes a permanent, temporary, initial, and modification order. Child-custody determination does not include an order relating to child support or other monetary obligation of an individual. [MCL 722.1102(c).]

We conclude that registration to enforce a child-custody determination from another state is distinct from actually making a child-custody determination. MCL 722.1102(d) plainly indicates that a "[c]hild-custody proceeding does not include a proceeding involving juvenile delinquency, contractual emancipation, or *enforcement under article 3*." MCL 722.1102(d) (emphasis added). Further, nothing in MCL 722.1102(c) indicates that waiver of jurisdiction by Mississippi amounts to a child-custody determination. Thus, we conclude that the mere registration of the custody decree in Virginia and waiver of jurisdiction by Mississippi is not a childcustody determination.

We nonetheless conclude that the Michigan court did not err in declining to exercise jurisdiction to modify the custody order. Pursuant to the plain language of MCL 722.1203(a), the court of the other state, Virginia, has not determined it "no longer has exclusive, continuing jurisdiction . . . or that a court of this state [Michigan] would be a more convenient forum . . . ." Regardless of the nonsuit, it cannot be contested that the Mississippi court, which at one time had exclusive, continuing jurisdiction, declined to exercise jurisdiction over this

matter and expressly found Virginia the more appropriate forum. The record also shows that for some time the Virginia court properly exercised jurisdiction over this family. And while we appreciate that the effect of a nonsuit in Virginia is to render the action void *ab initio*, MCL 722.1203(a) expressly vests in Virginia the power to determine whether it "no longer has exclusive, continuing jurisdiction . . . ." Here, the Virginia district court expressly found that the nonsuit did not affect its jurisdiction. To the extent that plaintiff finds error in this determination, the appropriate remedy is not in the Michigan Court of Appeals. Rather, plaintiff should have sought a stay of the Michigan action, pending review of the Virginia district court's determination by a higher court. See MCL 722.1206(3)(a). For these reasons, we conclude that the Michigan court did not abuse its discretion by declining to exercise jurisdiction under the UCCJEA to modify a foreign custody order.

Affirmed.

NASH v SALTER

Docket No. 282311. Submitted April 1, 2008, at Detroit. Decided August 7, 2008, at 9:05 a.m.

Rochelle L. Nash, Jeffrey S. Salter, and their child (who was born on August 3, 2006) lived in Texas with Salter's parents, Steve and Karen Salter from approximately August 5, 2006, to March 20, 2007. On March 21, 2007, Jeffrey Salter filed a petition in the 356th Judicial District Court of Texas asking the court to name him as the sole managing conservator of the child. On May 20, 2007, Jeffrey Salter and the child moved to Michigan to join Nash, who had moved to Michigan on March 20, 2007. On July 23, 2007, Steve and Karen Salter filed in the Texas court a petition in intervention, claiming that appointing Nash and Jeffrey Salter as joint managing conservators for the child would not be in the child's best interest and that Steve and Karen Salter should be appointed as joint managing conservators with the exclusive right to specify the child's primary residence. On August 22, 2007, Nash and Jeffrey Salter filed a complaint against Steve and Karen Salter in the Wayne Circuit Court, Family Division, seeking a determination of custody. On October 1, 2007, the Texas court entered an order awarding Steve and Karen Salter physical custody of the child. The Wayne Circuit Court, Amy P. Hathaway, J., dismissed Nash and Jeffrey Salter's action in that court, ruling that it lacked subject-matter jurisdiction. Nash and Jeffrey Salter appealed.

The Court of Appeals *held*:

1. The circuit court could not take jurisdiction pursuant to § 201(a)(1) of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1201(1)(a), to make an initial child-custody determination because Michigan was not the child's home state, having not lived in Michigan for at least six consecutive months immediately before the commencement of the child-custody proceeding in Michigan.

2. The circuit court could not take jurisdiction under § 201(a)(2) of the UCCJEA, MCL 722.1201(1)(b). Jurisdiction cannot be premised on that provision unless there is no home state or a court of the home state of the child has declined to exercise jurisdiction. Neither situation obtained in this case.

3. The circuit court properly ruled that because the Texas court had jurisdiction substantially in conformity with the UCCJEA, the circuit court had to dismiss Nash and Jeffrey Salter's complaint. Section 206(a) of the UCCJEA. MCL 722.1206(1), provides that a court may not exercise its jurisdiction under Article 2 of the UCCJEA if, at the time of the commencement of the proceeding, a child-custody proceeding has been commenced in a court of another state having jurisdiction substantially in conformity with the UCCJEA. In this case, a child-custody proceeding had been commenced in the Texas court at the time the Michigan proceeding was commenced. Texas was the child's home state and the Texas court had jurisdiction under § 201 of the UCCJEA.

4. The requirements of §§ 106 and 205(1) of the UCCJEA—which concern child-custody determinations, notice, and an opportunity to be heard—do not apply to a temporary restraining order issued by the Texas court because the order was not a child-custody determination.

5. Nash and Jeffrey Salter's general appearance in the form of their response to Steve and Karen Salter's petition in intervention constituted a waiver of the issue of personal jurisdiction and any due-process objection based on inadequate service of process.

6. None of the UCCJEA provisions cited by Nash and Jeffrey Salter indicates that the inadequacy of the pleadings under § 209 of the UCCJEA deprived the Texas court of subject-matter jurisdiction.

7. Nash and Jeffrey Salter provided no supporting legal authority for their claim that because Jeffrey Salter had abandoned the petition he filed in Texas, the Texas child-custody proceeding should be considered as having been initiated on July 23, 2007, when Steve and Karen Salter filed their petition in intervention, so as to allow the circuit court to take jurisdiction.

8. Nash and Jeffrey Salter have failed to show that Steve and Karen Salter did not have standing to intervene in the Texas court proceeding.

9. The Court of Appeals is unable to consider Nash and Jeffrey Salter's claim that the Texas court denied them their due-process rights in light of their failure to provide the Court of Appeals with a transcript of the proceedings in the Texas court.

10. Given Nash and Jeffrey Salter's admission that they received notice of the September 24, 2007, hearing by mail on September 7, 2007, there are no grounds for concluding that they did not receive proper notice under Michigan law. UCCJEA § 108(a); MCR 2.119(C)(1)(a); MCR 2.107(C).

Affirmed.

1. PARENT AND CHILD — UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT — COURTS — JURISDICTION — APPEAL.

Whether to exercise jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act is within a trial court's discretion and its determination will not be reversed on appeal absent an abuse of that discretion (MCL 722.1101 *et seq.*).

2. PARENT AND CHILD — UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT — COURTS — JURISDICTION — SIGNIFICANT CONNECTION WITH STATE OTHER THAN MERE PRESENCE.

A court does not have jurisdiction to make an initial child-custody determination pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act provision regarding significant connection with the state other than mere presence unless the court first establishes that there is no home state for the child or that a court of the home state of the child has declined to exercise jurisdiction (MCL 722.1201[1][b]).

Roger L. Premo and *Phillip D. Hickey* for the plaintiffs.

Steve Salter and Karen Salter, *in propriis personis*.

Before: ZAHRA, P.J., and WHITBECK and BECKERING, JJ.

ZAHRA, P.J. Plaintiffs, Rochelle Nash and Jeffrey Salter, appeal as of right the order of the circuit court dismissing their complaint for determination of custody. On appeal, they argue that the circuit court erred in finding that it lacked subject-matter jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1201, to make a child-custody determination with respect to their daughter. Plaintiffs had asked the circuit court to take jurisdiction of this custody dispute and deny enforcement of a Texas custody order that plaintiffs contend was rendered without jurisdiction. We conclude that plaintiffs cannot establish home-

state jurisdiction under the UCCJEA. We also conclude that the circuit court properly determined that the Texas court established jurisdiction substantially in conformity with the UCCJEA. Further, we conclude that defendants, Steve Salter and Karen Salter, properly intervened in the custody action in Texas instituted by plaintiff Jeffrey Salter. We affirm.

I. BASIC FACTS AND PROCEEDINGS

This case arises from a custody dispute between plaintiffs, the parents of the child, and defendants, who are Jeffrey Salter's parents. Plaintiffs and the child, who was born August 3, 2006, lived with defendants in Texas from approximately August 5, 2006, until March 20, 2007. On March 20, 2007, Rochelle Nash moved to Michigan, and, the next day, Jeffrey Salter filed a petition in the 356th Judicial District Court of Texas ("the Texas court") asking that court to enter an order making him "sole managing conservator" of the child. On or about May 20, 2007, Jeffrey Salter moved to Michigan with the child. He apparently did not further pursue the petition for custody. The child resided in Michigan with both plaintiffs commencing on or about May 21, 2007. On July 23, 2007, defendants filed a "Petition in Intervention of Grandparents in Suit Affecting the Parent-Child Relationship" in the Texas court. They claimed that "appointment of [plaintiffs] as joint managing conservators would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development," and asked the Texas court to appoint them joint managing conservators with the "exclusive right to designate the primary residence of the child."

Plaintiffs filed their complaint for determination of jurisdiction and custody in the Wayne Circuit Court

("the Michigan court") on August 22, 2007. They argued that the Texas court did not have jurisdiction under the UCCJEA and that the Michigan court had jurisdiction. Accordingly, plaintiffs asked the Michigan court to award them custody of the child.

On October 1, 2007, the Texas court entered an order appointing defendants temporary sole managing conservators and plaintiffs temporary possessory conservators of the child. The Texas court's order provided that defendants had the right to physical custody of the child and that plaintiffs were to have possession of the child at times mutually agreed upon in advance by the parties. The order further provided that defendants "shall take immediate possession of the child at [plaintiffs'] residence" in Michigan. Defendants successfully moved to dismiss plaintiffs' complaint in the Michigan court. An order dismissing the Michigan action for lack of subject-matter jurisdiction was entered on November 7, 2007. The child moved back to Texas and has resided with defendants since December 3, 2007. Plaintiffs returned to Texas to be near the child.

II. STANDARD OF REVIEW

"Whether a trial court has subject-matter jurisdiction presents a question of law that this Court reviews de novo." *Atchison v Atchison*, 256 Mich App 531, 534; 664 NW2d 249 (2003). However, "the determination whether to exercise jurisdiction under the UCCJEA [is] within the discretion of the trial court, and would not be reversed absent an abuse of that discretion." *Young v Punturo* (*On Reconsideration*), 270 Mich App 553, 560; 718 NW2d 366 (2006). The jurisdictional determination in this case involves the UCCJEA, codified in Michigan as MCL 722.1101 *et seq*. We review issues of statutory construction de novo as questions of law. *Atchison*,

supra at 534-535. We also review constitutional questions de novo. *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 620; 692 NW2d 388 (2004).

III. ANALYSIS

A. JURISDICTION IN MICHIGAN

Plaintiffs first argue on appeal that the Michigan court erred in determining that it lacked subject-matter jurisdiction for the sole reason that Michigan did not have home-state jurisdiction under the UCCJEA, MCL 722.1201. Although plaintiffs are correct that this is not the only basis for jurisdiction, we nevertheless conclude that the Michigan court properly dismissed plaintiffs' complaint.

The UCCJEA became effective in Michigan on April 1, 2002. Section 201, codified in Michigan as MCL 722.1201, sets forth the basic jurisdictional requirement for making an initial custody determination:

> (1) Except as otherwise provided in section 204,[1] a court of this state has jurisdiction to make an initial child-custody determination only in the following situations:
>
> (a) This state is the home state[2] of the child on the date of the commencement of the proceeding, or was the home

[1] Section 204, MCL 722.1204, provides for temporary emergency jurisdiction in a court of this state "if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." This provision is not relevant here because plaintiffs made no such allegation in their complaint.

[2] " 'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding." MCL 722.1102(g).

> state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
>
> (b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 207 or 208, and the court finds both of the following:
>
> (*i*) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
>
> (*ii*) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.
>
> (c) All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under section 207 or 208.
>
> (d) No court of another state would have jurisdiction under subdivision (a), (b), or (c).
>
> (2) Subsection (1) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.
>
> (3) Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child-custody determination.

As plaintiffs concede, the Michigan court correctly determined that Michigan was not the child's home state on the date of the commencement of the Michigan proceeding, nor had Michigan been the child's home state within six months before the commencement of the proceeding. The Michigan proceeding was commenced on August 22, 2007, when plaintiffs filed a complaint in the Michigan court. The child lived in

Texas from the time she was born on August 3, 2006, until May 20, 2007, when she moved to Michigan with her father. Accordingly, Texas was the child's home state. MCL 722.1201(1)(a). When the Michigan proceeding was commenced, the child had only lived in Michigan for approximately three months and had not lived in Michigan previously.

Plaintiffs nonetheless argue that the Michigan court erred by ruling that Michigan lacked subject-matter jurisdiction to make a custody determination solely because the Michigan court did not have home-state jurisdiction. Home-state jurisdiction under MCL 722.1201(1)(a) is not the only jurisdictional basis for making an initial custody determination. Plaintiffs argue that MCL 722.1201(1)(b) provides an alternative ground to support a finding of jurisdiction in Michigan. Plaintiffs refer to this jurisdictional ground as "significant connection" jurisdiction. Plaintiffs' argument is without legal merit.

Jurisdiction cannot be premised on the family's significant connection to Michigan unless the court first establishes: (1) there is no "home state" as that term is used in MCL 722.1201(1)(a), or (2) "a court of the home state of the child has declined to exercise jurisdiction . . . ." MCL 722.1201(1)(b). Neither of the above circumstances exists in the present case. Texas is the child's home state and the Texas court did not decline to exercise jurisdiction. Thus, Michigan does not have significant connection jurisdiction over this matter.

B. DISMISSAL AFTER CONCLUDING TEXAS HAD JURISDICTION IN SUBSTANTIAL CONFORMITY WITH THE UCCJEA

Plaintiffs' second argument on appeal is that the Michigan court erred in determining that, because the Texas court had jurisdiction substantially in conformity

with the UCCJEA, it was required to dismiss plaintiffs' complaint. We again find no merit to plaintiffs' argument.

MCL 722.1206, which governs simultaneous proceedings, provides in pertinent part:

> (1) Except as otherwise provided in section 204, a court of this state may not exercise its jurisdiction under this article if, at the time of the commencement[3] of the proceeding, a child-custody proceeding has been commenced in a court of another state having jurisdiction substantially in conformity with this act, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under section 207.
>
> (2) Except as otherwise provided in section 204, before hearing a child-custody proceeding, a court of this state shall examine the court documents and other information supplied by the parties as required by section 209. If the court determines that, at the time of the commencement of the proceeding, a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this act, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this act does not determine that a court of this state is a more appropriate forum, the court of this state shall dismiss the child-custody proceeding.

Thus, because a child-custody proceeding had been commenced in Texas at the time of the commencement of the Michigan proceeding on August 22, 2007, the issue is whether Texas had "jurisdiction substantially in conformity with this act." MCL 722.1206(1). When Jeffrey Salter filed his petition in the Texas court on

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[3] " 'Commencement' means the filing of the first pleading in a proceeding." MCL 722.1102(e).

March 21, 2007, the child had lived with one or both plaintiffs in defendants' home since she was born on August 3, 2006—more than six months. Accordingly, Texas was the child's home state on the date of the commencement of the proceeding and therefore had subject-matter jurisdiction under section 201 of the UCCJEA.[4]

Plaintiffs also argue that the Michigan court was required to find that the temporary restraining order of the Texas court[5] violated §§ 106 and 205(1) of the UCCJEA. Section 106[6] provides:

> A child-custody determination made by a court of this State that had jurisdiction under this [Act] binds all persons who have been served in accordance with the laws of this State or notified in accordance with Section 108 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified. [Brackets in original.]

Section 205(a)[7] provides that, "[b]efore a child-custody determination is made under this [Act], notice and an opportunity to be heard in accordance with the standards of Section 108 must be given to each person entitled to notice under the law of this State . . . ." Subsection b makes clear that "[t]his [Act] does not govern the enforceability of a child-custody determination made without notice or an opportunity to be

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[4] Tex Fam Code Ann § 152.201(a) is the similar Texas provision.

[5] The Texas court actually entered two temporary restraining orders, one on March 21, 2007, following Jeffrey Salter's filing of his petition, and one on July 25, 2007, following defendants' filing of their motion to intervene. Plaintiffs do not specify whether they are referring here to one or both temporary restraining orders.

[6] MCL 722.1106 is the similar Michigan provision.

[7] MCL 722.1205(1) is the similar Michigan provision.

heard." Under § 108(a), "[n]otice required for the exercise of jurisdiction when a person is outside this State may be given in a manner prescribed by the law of this State for service of process or by the law of the State in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective." Section 108 "authorizes notice and proof of service to be made by any method allowed by either the State which issues the notice or the State where the notice is received." Comment, UCCJEA § 108.

The Texas court issued temporary restraining orders on March 21, 2007, and July 25, 2007, but these were not "child-custody determinations." " 'Child-custody determination' means a judgment, decree, or other order of a court providing for legal custody, physical custody, or visitation with respect to a child." UCCJEA § 102(3); see also MCL 722.1102(c). Although the definition of "child-custody determination" under this provision does include a temporary *custody* order, the temporary restraining orders entered by the Texas court on March 21, 2007, and July 25, 2007, "did not provid[e] for legal custody, physical custody, or parenting time." They merely ordered the parties to appear at later hearings to determine whether provisions for temporary custody should be made while the custody case was pending.

Also, it appears that plaintiffs waived the issue of personal jurisdiction, and, accordingly, any due-process objection based on inadequate service of process. Service of process is an issue of personal jurisdiction, objections to which may be waived by filing a general appearance. See *Seals v Upper Trinity Regional Water Dist*, 145 SW3d 291, 296 (Tex App, 2004) ("Without notice via the required service of citation or a waiver

thereof, nothing short of a general appearance will confer personal jurisdiction upon the trial court."). "A general appearance is normally in the form of an answer to the claims made in the suit." *Id*. See also Rule 121 of the Texas Rules of Civil Procedure ("An answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him."). Although the parties stipulated that Rochelle Nash was never served properly in connection with Jeffrey Salter's original petition in the Texas court, defendants allegedly personally served plaintiffs when they filed their petition in intervention on July 23, 2007. They claimed that plaintiffs were served, on July 30, 2007, with the petition, the temporary orders, and the order to appear. Defendants also claim that plaintiffs filed a response to defendants' petition in intervention, which they have attached to their brief on appeal as Exhibit 2. This document bears a filing date of August 21, 2007. This is not part of the lower-court file; however, plaintiffs do not contest its authenticity. Thus, by their general appearance in the form of their response to defendants' petition in intervention, plaintiffs waived the issue of personal jurisdiction, and, accordingly, any due-process objection based on inadequate service of process.

Plaintiffs also argue that defendants' petition in intervention failed to meet several pleading requirements of § 209 of the UCCJEA, and, accordingly, that "the Texas court failed to conduct the proceeding in substantial conformity with the UCCJEA." Section 209(a), as codified in Texas, provides, in part:

> [E]ach party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of

> the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:
>
> (1) has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number, and the date of the child-custody determination, if any;
>
> (2) knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding; and
>
> (3) knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

Jeffrey Salter's initial petition in the Texas court contains only the child's county of residence. Further, the petition states only that "[n]o court has continuing jurisdiction of this suit or of the child [sic] the subject of this suit" and that "[t]here are no court-ordered conservatorships, court-ordered guardianships, or other court-ordered relationships affecting the child [sic] the subject of this suit." The record does not reflect that there is an affidavit included with this petition, and it is not clear whether an affidavit was filed with the petition in the Texas court. Defendants' petition in intervention contains exactly the same information, and, again, it is not clear whether an affidavit was also filed.

Nevertheless, the Texas court was not *required*, under § 209 of the UCCJEA, to take any action as a result of the deficiency of the parties' pleadings. Under subsection b, a court "may" stay the proceedings

if the information set forth in subsection a is not provided. There is nothing in the language of the provisions of the UCCJEA cited by plaintiffs to indicate that the inadequacy of the pleadings under § 209 deprived the Texas court of subject-matter jurisdiction, and that the Michigan court therefore erred in declining to exercise jurisdiction on this basis.

C. DEFENDANTS' INTERVENTION IN THE TEXAS COURT PROCEEDINGS

Plaintiffs' third argument on appeal is that defendants could not validly intervene in the custody action commenced by Jeffrey Salter and that the date of the commencement of the Texas proceeding could not, therefore, be considered March 21, 2007. We disagree.

Jeffrey Salter filed his petition in the Texas court on March 21, 2007. Thus, as already discussed, Texas was the child's home state on the date of the commencement of the proceeding, UCCJEA § 201, because the child had resided in Texas for at least six months immediately before the commencement of that proceeding. UCCJEA § 102(7). This means that Texas had jurisdiction to make an initial child-custody determination. Plaintiffs argue, however, that July 23, 2007, the date defendants filed their petition in intervention, should be considered the date of the commencement of the proceeding. They base this argument on the claim that process was never served in connection with Jeffrey Salter's petition (the parties stipulated that Rochelle Nash was not properly served), and "because the matter had become completely moot as of May 21, 2007[,] when Jeffrey Salter and the child arrived at their new residence in Michigan," and Jeffrey Salter "abandoned" his petition. They therefore argue that defendants' petition in intervention should be treated

as an original filing, and the relevant date for determining whether Texas had jurisdiction was July 23, 2007. Because plaintiffs cite no legal authority that compels the conclusion that the Michigan court was required or permitted to disregard the date of the initial filing, they have abandoned this issue. See *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003) ("An appellant may not . . . give issues cursory treatment with little or no citation of supporting authority. . . . [F]ailure to properly address the merits of [the appellant's] assertion of error constitutes abandonment of the issue.").

Plaintiffs essentially ask this Court to determine that the Texas court should have dismissed Jeffrey Salter's petition as moot, or otherwise disregarded it for purposes of determining the date of the commencement of the Texas proceeding. However, this Court's role in this appeal is not to consider the propriety of the Texas proceedings under Texas law. It is simply to determine whether the Michigan court properly declined to exercise jurisdiction to determine the custody issue between the parties. The only relevance of plaintiffs' arguments in connection with this issue to the questions before the Michigan court below and this Court on appeal is as they pertain to § 206 of the UCCJEA: the Michigan court was not permitted to exercise its jurisdiction if, at the time of the commencement of the proceeding, a child-custody proceeding had been commenced in a court of another state having jurisdiction substantially in conformity with this act. For purposes of this inquiry, the Texas proceeding was commenced when Jeffrey Salter filed his petition on March 21, 2007. " 'Commencement' means the filing of the first pleading in a proceeding.' " UCCJEA § 102(5). Thus, a proceeding had been commenced within the meaning of MCL 722.1206(1) at the time plaintiffs filed their complaint

in the Michigan court, and, on March 21, 2007, Texas was the child's home state and Texas therefore had jurisdiction to make an initial custody determination under § 201 of the UCCJEA. Accordingly, the Michigan court was not permitted to exercise jurisdiction.

D. PLAINTIFFS' REMAINING ISSUES

Plaintiffs' fourth argument on appeal is that the Texas court did not have "extended home state jurisdiction" or "significant connection" jurisdiction under the UCCJEA.[8] Because we conclude, as discussed earlier, that the Texas court had jurisdiction substantially in conformity with § 206 of the UCCJEA, because it was the child's home on the date of the commencement of the Texas proceeding, we need not address this argument.

Plaintiffs' fifth argument on appeal is that the Texas court lacked jurisdiction because defendants did not have standing to intervene in Jeffrey Salter's petition for custody. We disagree.

Although the Full Faith and Credit Clause, in addition to § 303 of the UCCJEA and 28 USC 1738A, requires recognition of sister-state judgments, the con-

[8] Under § 201 of the UCCJEA, a state has "extended home state jurisdiction" where it "was the home state of the child within six months before the commencement of the proceeding and child is absent from this State but a parent or person acting as a parent continues to live in this State." UCCJEA § 201(a)(1); Comment, § 201. A state has "significant connection" jurisdiction where no other state has home state or extended home-state jurisdiction, or "a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum," and "the child and the child's parents, or the child and at least one parent or person acting as a parent, have a significant connection with this State other than mere physical presence," and, "substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships." UCCJEA § 201(a)(2).

stitution does not compel Michigan courts to recognize such judgments where the issuing court lacked jurisdiction over the subject matter or the parties. *Blackburne*, *supra* at 620-621; 28 USC 1738A(a) and (c). "[C]ollateral attack may be made in the courts of this state by showing that the judgment sought to be enforced was void for want of jurisdiction in the court which issued it." *Blackburne*, *supra* at 620-621 (quotation marks and citation omitted). Thus, if plaintiffs can demonstrate that the Texas court lacked personal or subject-matter jurisdiction over this matter, its child-custody order is not entitled to full faith and credit by the courts of this state.

"Standing, as a necessary component of a court's subject-matter jurisdiction, is a constitutional prerequisite to maintaining a suit under Texas law." *In re CMC*, 192 SW3d 866, 869 (Tex App, 2006). "If a party lacks standing, a court lacks subject-matter jurisdiction to hear a case." *Id*. Under Texas law, grandparents do not generally have standing to file an original suit requesting managing conservatorship. Tex Fam Code Ann § 102.004(a). However, under certain circumstances, a Texas court may grant a grandparent leave to intervene. Section 102.004(b) of the Texas Family Code permits a court to grant a grandparent leave to intervene in a pending, properly commenced suit where "there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development."

In this case, defendants, in their July 23, 2007, petition in intervention, alleged as follows:

> *Conservatorship*
>
> It is in the best interest of the child that Intervenors be appointed joint managing conservators of the child. Further, the appointment of the parents as joint managing

> conservators would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development.

While neither the temporary restraining order issued by the Texas court following defendants' filing of their petition in intervention, nor its October 1, 2007, order granting defendants temporary custody, explicitly addresses the issue of defendants' standing to intervene, there is no basis on which this Court can conclude that the Texas court erred in allowing defendants to intervene because no record of the Texas proceedings has been provided. It is therefore not clear whether there was evidence to support a finding that "appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development." Tex Fam Code Ann § 102.004(b). Accordingly, plaintiffs have not shown that the judgment of the Texas court "was void for want of jurisdiction." *Blackburne*, *supra* at 620-621.

Plaintiffs' final argument on appeal is that they were denied their due-process rights under the Fourteenth Amendment by virtue of the proceedings in the Texas court and that court's temporary custody order. We disagree.

Plaintiffs allege that the temporary order of the Texas court violated their due-process rights under the Fourteenth Amendment because "competent evidence was not presented to demonstrate that both parents were unfit and [to] overcome the presumption that the parent of the child is fit to raise the child" at the hearing on September 24, 2007, and they were denied the presumption that they were fit parents. They also argue that the Texas court deprived them of custody of the child on the basis of the "lone allegation" that

"[a]ppointment of the parents as joint managing conservators would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development," which "did not inform Plaintiffs as to what charges they would have to defend at the hearing on temporary custody."

As noted by the Michigan Supreme Court, the United States Supreme Court has recognized that parents have a "fundamental right" to make decisions concerning the upbringing of their children and that these decisions are entitled to deference. *DeRose v DeRose*, 469 Mich 320, 331-332; 666 NW2d 636 (2003), citing *Troxel v Granville*, 530 US 57, 66, 75, 80; 120 S Ct 2054; 147 L Ed 2d 49 (2000). However, even assuming that it is appropriate for this Court to consider whether the Texas court denied a presumption to which they were constitutionally entitled or rendered its decision without "competent evidence," we are unable to do so because plaintiffs have not provided a transcript of the Texas proceedings.

Plaintiffs also argue that, because defendants "did not file the case under the UCCJEA," they "did not give [p]laintiffs customary notice of their right to make application to appear by telephone or other electronic means pursuant to Section 111 of the UCCJEA,[9] MCL 722.1111," and, because plaintiffs lived 1,280 miles

[9] Section 111 of the UCCJEA provides:

> (a) In addition to other procedures available to a party, a party to a child-custody proceeding may offer testimony of witnesses who are located in another State, including testimony of the parties and the child, by deposition or other means allowable in this State for testimony taken in another State. The court on its own motion may order that the testimony of a person be taken in another State and may prescribe the manner in which and the terms upon which the testimony is taken.

from the Texas court and could not afford to travel to Texas or hire a Texas attorney, they were effectively denied the opportunity for a hearing. While it is clear that this custody dispute is governed by the UCCJEA, plaintiffs cite no authority for the proposition that defendants were required to "*file* the case under the UCCJEA" (emphasis added), or articulate precisely what they mean by that, and although § 209 of the UCCJEA contains certain pleading requirements, the remedy for lack of such information in the pleadings is a stay of the proceedings, either upon motion of a party or the court. UCCJEA § 209(b).

Under § 108(a) of the UCCJEA, plaintiffs could properly be given notice under either Michigan or Texas rules for service of process. MCR 2.119(C)(1)(a) provides that, "[u]nless a different period is set by these rules or by the court for good cause, a written motion (other than one that may be heard ex parte), notice of the hearing on the motion, and any supporting brief or affidavits must be served . . . at least 9 days before the time set for the hearing, if served by mail." Under MCR 2.107(C) service on a party may be made by mail, and "[s]ervice by mail is complete at the time of mailing." Given plaintiffs' admission, in their brief on appeal, that they received notice of the September 24, 2007,

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(b) A court of this State may permit an individual residing in another State to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that State. A court of this State shall cooperate with courts of other States in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another State to a court of this State by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

hearing by mail on September 7, 2007, there are no grounds to conclude that they did not receive proper notice under Michigan law.

Affirmed.

WOODMAN v KERA, LLC

Docket Nos. 275079 and 275882. Submitted June 10, 2008, at Grand Rapids. Decided August 12, 2008, at 9:00 a.m. Leave to appeal sought.

Trent Woodman, a minor, through his mother and next friend, Sheila Woodman, brought an action in the Kent Circuit Court against Kera, L.L.C., which operates a facility that contains large, inflatable play equipment, seeking damages for injuries he sustained when he jumped from a slide during a birthday party held for him at the defendant's facility, which had been rented for that purpose by Sheila Woodman. The plaintiff alleged negligence, gross negligence, and violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. The defendant moved for summary disposition, arguing that the plaintiff's father signed a valid release before the party on behalf of the plaintiff and waived all of the plaintiff's potential claims against the defendant. The defendant further claimed that the plaintiff could not prove gross negligence but, if he could, liability was precluded because the danger of jumping from the slide constituted an open and obvious hazard. The defendant also asserted that it had no duty to supervise the plaintiff because his parents were with him at the time of the accident. Finally, the defendant sought dismissal of the MCPA claim, alleging that it did not make any misrepresentations and that the allegations in the complaint do not comprise the type of case the MCPA was designed to remedy. The plaintiff moved for summary disposition with regard to the affirmative defense of waiver, asserting that the purported waiver was invalid as a matter of law because a parent may not waive, release, or compromise claims by or against his or her child. The court, Donald A. Johnston, J., held that the waiver was valid and should be given effect. The court dismissed the claim of ordinary negligence, but declined to dismiss the gross-negligence claim and the claim alleging violation of the MCPA, holding that further testimony was necessary before the issues could be decided. The court questioned application of an open-and-obvious-danger defense and rejected the assertion that the defendant had no duty to supervise the plaintiff because of the fact that his parents were present. The court thereafter rejected the plaintiff's assertion that the defendant violated public policy through false advertising or claims regarding the

safety of the facility. Both parties sought leave to appeal. The Court of Appeals granted both applications and consolidated the appeals.

The Court of Appeals *held*:

1. Michigan caselaw adheres to the common-law precept that a parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims of his or her child. Michigan does permit specific statutory exceptions to the common-law rule of preclusion of parental authority regarding the release or waiver of children's rights.

2. No statute permits a parent to release the property rights of his or her child under the circumstances presented in this case.

3. The trial court's determination regarding the validity of the waiver must be reversed and the matter must be remanded for reinstatement of the negligence claim.

4. The trial court properly determined that the plaintiff failed to demonstrate that the defendant possessed a substantial lack of concern for the plaintiff's safety or well-being. Summary disposition of the gross-negligence claim was not error.

5. The open-and-obvious danger doctrine is inapplicable to this action because the case involves a claim of negligence and does not meet the definitional requirements of either a premises-liability action or a products liability action.

6. The presence of the plaintiff's parents did not serve to abrogate the defendant's duty as the premises owner.

7. There is no evidence that the defendant tried to deceptively obtain a waiver. The trial court erred as a matter of law in failing to grant the defendant's motion for summary disposition of the MCPA claim.

Reversed and remanded.

BANDSTRA, P.J., concurring, wrote separately to stress that the result that must be reached in this case has a great impact and therefore the Legislature or the Supreme Court should address and further consider the issues raised in this case.

SCHUETTE, J., concurring, wrote separately to emphasize several issues of extreme legal and policy significance that should be addressed as a consequence of this decision.

PARENT AND CHILD — WAIVER OF CHILD'S CLAIMS.

A parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims of his or her child either before or after such claims arise; exceptions to this common-law rule may be provided by statute.

Rhoades McKee PC (by *Gregory G. Timmer, Paul A. McCarthy*, and *Stephen J. Hulst*) for the plaintiff.

Feuer & Kozerski, PC (by *Scott L. Feuer*), for the defendant.

Before: BANDSTRA, P.J., and TALBOT and SCHUETTE, JJ.

TALBOT, J. Trent Woodman, a minor, through his mother and next friend, Sheila Woodman, appeals the orders granting defendant's motion for summary disposition of plaintiff's negligence claim and denying plaintiff's motion for summary disposition with regard to defendant's affirmative defense of waiver. Defendant appeals the order denying defendant's motion for summary disposition of plaintiff's claims of gross negligence and violation of the Michigan Consumer Protection Act.[1] I would reverse and remand to the trial court.

I. FACTUAL HISTORY

Sheila Woodman rented defendant's facility, which contains large, inflatable play equipment, for her son's fifth birthday party. Defendant provided invitations to Sheila Woodman, which she subsequently forwarded to the party guests. The content of the invitation was as follows:

> _____ has been invited to a _____ party for _____.
> The party will be held at **Bounce Party**
> on _____, _____ from _____ to _____.
> Please RSVP at _____ before _____.

[1] This Court granted each party's application for leave to appeal and consolidated the two appeals. *Woodman v Kera LLC*, unpublished orders of the Court of Appeals, entered April 13, 2007 (Docket Nos. 275079 and 275882).

We are hosting our party at Bounce Party in Kentwood. We will have chaperon[e]s present to ensure that this is a safe and enjoyable party. We need a parent/guardian to review and sign the information below and send it with your child on party day. Please have your child at Bounce Party 15 minutes before the party start time.

Thank you, _____

Your Host

Bounce Party is an indoor inflatable play arena with interactive inflatables. Your child may have the opportunity to bounce, slide, maneuver mazes, run challenge courses, bouncy box, bungee basketball and joust. Your hosts will have chaperon[e]s on site and we will have staff members present. To ensure a safe and enjoyable party please be sure that your child follows these few simple rules prior to attending the party.

◊ Please RSVP to your host. We really hope you will be able to attend the party.

◊ Wear CLEAN socks. No shoes or bare feet are allowed in the play arena.

◊ Wear comfortable clothes.

◊ Leave all jewelry, sharp objects, keys, hair bands, pencils, watches, etc. at home.

◊ Let your child know that good manners are expected and inappropriate behavior will result in removal.

◊ Be sure that the parent/guardian of the guest signs this release and the guest brings it with them to the party. Anyone without parent/guardian approval will not be able to participate in the arena games. If you have multiple guests in your family, you can list all their names on this one form.

THE UNDERSIGNED, by his/her signature herein affixed does acknowledge that any physical activities involve some element of personal risk and that, accordingly, in consideration for the undersigned waiving his/her claim against

BOUNCE PARTY, and their agents, the undersigned will be allowed to participate in any of the physical activities.

By engaging in this activity, the undersigned acknowledges that he/she assumes the element of inherent risk, in consideration for being allowed to engage in the activity, agrees to indemnify and hold BOUNCE PARTY, and their agents, harmless from any liability for personal injury, property damage or wrongful death caused by participation in this activity. Further, the undersigned agrees to indemnify and hold BOUNCE PARTY, and their agents, harmless from any and all costs incurred including, but not limited to, actual attorney's fees that BOUNCE PARTY, and their agents, may suffer by an action or claim brought against it by anyone as a result of the undersigned's use of such facility.

Participant:_____Signature: _____
PRINTED NAME Parent or Legal Guardian's signature if participate [sic] is under age 18.

Date: _____

BE SURE YOU COMPLETE THIS CARD AND SEND IT WITH THE PARTY GUEST!

On the day of the party, plaintiff's father, Jeffrey Woodman, signed the above document on plaintiff's behalf. An employee of defendant conducted a "safety talk" before the party started, which defendant asserted specifically included an instruction not to jump from the slide. In addition, written rules posted on the slide and the wall informed guests not to jump from the slide. However, after correctly using the slide five times, plaintiff jumped from the top of the slide, fell to the ground, and broke his leg.

II. LOWER-COURT PROCEDURAL HISTORY

Plaintiff, through his mother and next friend, filed a three-count complaint against defendant, alleging gross

negligence, negligence, and violation of Michigan's Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Plaintiff alleged that defendant knowingly failed to provide supervision, ignored the slide's manufacturer's warnings and safety instructions, did not properly equip the slide with available safety devices, and failed to have an attendant to monitor the slide. Plaintiff contended that these failures and omissions were the direct and proximate causes of his injuries. With respect to the MCPA claim, plaintiff alleged that defendant falsely advertised itself as providing a safe play environment when, in fact, defendant knew it failed to install appropriate safety equipment and provide adequate supervision. Defendant filed an answer to the complaint, denying plaintiff's claims and asserting affirmative defenses, including the defense of waiver.

On July 27, 2006, pursuant to MCR 2.116(C)(7), (8), and (10), defendant moved for summary disposition of all three counts. Defendant argued that plaintiff's father signed a valid release on behalf of plaintiff and waived all of plaintiff's potential claims against defendant and that plaintiff could not prove gross negligence. Further, even if gross negligence could be demonstrated, defendant contended that liability was precluded because the danger of jumping from the slide constituted an open and obvious hazard. Defendant asserted that it had no duty to supervise plaintiff because his parents were with him at the time of the accident. Defendant urged the trial court to dismiss plaintiff's MCPA claim because defendant did not make any misrepresentations and the allegations made in the complaint do not comprise the type of case the MCPA was designed to remedy. Concurrently, plaintiff moved for summary disposition on defendant's affirmative defense of waiver, pursuant to MCR 2.116(C)(8) and (10). Plaintiff argued that the purported waiver was

invalid as a matter of law because a parent may not waive, release, or compromise claims by or against his or her child.

The trial court conducted a hearing on the summary-disposition motions on September 14, 2006. The trial court determined that the waiver, signed by plaintiff's parent, was valid and should be given effect. When granting summary disposition on the waiver issue, the trial court noted the absence of "any Michigan case which says that a parent who signs a waiver like this one prior to a child engaging in an activity is engaging in an act which is a legal nullity." The trial court further opined that it concurred with the general proposition that a parent can validly execute a waiver approving his or her child's participation in an activity and dismissed plaintiff's claim of ordinary negligence.

Considering plaintiff's gross-negligence claim, the trial court opined that plaintiff's counsel provided a sufficient demonstration that defendant ignored specific instructions or recommendations regarding use of and staffing for the slide. The trial court denied defendant's motion to dismiss plaintiff's gross-negligence claim because it found that "a reasonable finder of fact could conclude from that conduct that it constitutes a substantial indifference to whether an injury results from the operation of the slide."

Addressing defendant's defense of open and obvious danger, the trial court questioned whether a five-year-old had the intellectual capacity to comprehend the dangers inherent in jumping off a slide. Recognizing that negligence cannot be imputed to a child under the age of seven, the trial court reasoned that "[i]f negligence can't be imputed to them, I'm not really sure how they can be barred from proceeding by the open and obvious doctrine." The trial court further rejected de-

fendant's assertion that it had no duty to supervise plaintiff because of the presence of his parents, ruling that "the nature of the defendant's business is such that they have an inherent obligation in that regard." Because the scope of defendant's duty and whether it breached an existent duty comprised questions of fact for the jury, the trial court declined to grant defendant's request for summary disposition on this issue. Although the trial court questioned the applicability of the MCPA to plaintiff's claim, it declined to dismiss the claim until the issue could be further developed.

On November 6, 2006, pursuant to MCR 2.116(C)(8) and (10), plaintiff again moved for summary disposition regarding defendant's affirmative defense of waiver, asserting that the invitation language was insufficient to constitute a waiver. Plaintiff argued that the invitation did not waive or indemnify negligence claims against defendant because the document only addressed risks inherent in participating in the activities at defendant's facility. Defendant responded that the invitation constituted a valid waiver and barred all claims by plaintiff of ordinary negligence. The trial court concluded that the language contained in the waiver sufficiently apprised the signatory of the inherent risks involved in the activities and the assumption of those risks. Finding the language of the waiver provided clear notice, the trial court declined plaintiff's request to invalidate the waiver and also rejected plaintiff's assertion that defendant violated public policy through false advertising or claims regarding the safety of the facility. The trial court's rulings were subsequently memorialized in an order entered November 27, 2006.

Plaintiff moved for reconsideration of the trial court's decision to uphold the validity of the invitation

as a valid waiver of the negligence claim. Plaintiff argued that the trial court should reconsider its ruling because courts in other jurisdictions have invalidated similar provisions purporting to waive the negligence of for-profit businesses. However, plaintiff acknowledged that other state courts have upheld waivers to preclude negligence claims in situations involving nonprofit organizations or schools. The trial court denied plaintiff's motion for reconsideration, and this appeal ensued.

III. ISSUES ON APPEAL

In Docket No. 275079, defendant challenges the failure of the trial court to dismiss plaintiff's claims of gross negligence and violation of the MCPA. Defendant additionally asserts that the danger posed by jumping off the high point of a slide constitutes an open and obvious danger and contends that it did not have a duty to supervise plaintiff given the presence and proximity of his father to the slide when plaintiff was injured.

In Docket No. 275882, plaintiff poses the question whether the law and public policy of this state preclude effectuation of a preinjury waiver signed by a parent on behalf of his or her minor child. Plaintiff specifically queries the applicability of such a waiver to preclude liability of a for-profit business such as that engaged in by defendant.

IV. STANDARD OF REVIEW

This Court reviews a trial court's grant or denial of summary disposition de novo. *Willett v Waterford Charter Twp,* 271 Mich App 38, 45; 718 NW2d 386 (2006). Issues of statutory interpretation also comprise questions of law, which we review de novo. *Newton v Bank West,* 262 Mich App 434, 437; 686 NW2d 491 (2004).

In accordance with MCR 2.116(C)(7), a litigant may seek dismissal of a claim on the basis that it is barred because of a release. The filing of supportive materials or documents is not required. *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999). However, if documentation is provided in conjunction with a motion for dismissal under this subsection of the court rule, the materials provided must constitute admissible evidence and require consideration by the court. MCR 2.116(G)(5). All the plaintiff's well-pleaded factual allegations and other admissible documentary evidence must be accepted as true and construed in favor of the plaintiff, unless contradicted by documentation filed by the movant. *Maiden, supra* at 119.

As discussed in *Healing Place at North Oakland Med Ctr v Allstate Ins Co,* 277 Mich App 51, 55-56; 744 NW2d 174 (2007):

> Summary disposition under either MCR 2.116(C)(8) or (C)(10) presents an issue of law for [the Court's] determination and, thus, [the Court] review[s] a trial court's ruling on a motion for summary disposition de novo. Where the parties rely on documentary evidence, appellate courts proceed under the standards of review applicable to a motion made under MCR 2.116(C)(10).
>
> A motion made under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ.

> When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. But such materials "shall only be considered to the extent that [they] would be admissible as evidence . . . ." [Quotation marks and citations omitted.]

V. OTHER JURISDICTIONS

A. GENERAL OVERVIEW

At its most basic level, the predominant issue presented in this case concerns the authority of a parent to bind his or her minor child to an exculpatory agreement, which functions to preclude a defendant's liability for negligence, before an injury has even occurred. In its most general sense the issue juxtaposes the inherent rights and fundamental authority of a parent to make determinations for his or her minor child pursuant to the Fourteenth Amendment against public-policy concerns and the state's authority in accordance with the doctrine of *parens patriae*.[2]

The United States Supreme Court has recognized the fundamental right of parents to make decisions pertaining to the care, custody, and control of their minor children. See *Troxel v Granville,* 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000). The recognition of this right is based, in part, on

> [t]he law's concept of the family [which] rests on a presumption that parents possess what a child lacks in matu-

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[2] " 'Parens patriae,' which is Latin for 'parent of his or her country,' describes 'the state in its capacity as provider of protection to those unable to care for themselves.' " *Global Travel Marketing, Inc v Shea,* 908 So 2d 392, 399 (Fla, 2005), quoting Black's Law Dictionary (8th ed), p 1144.

> rity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. [*Parham v J R,* 442 US 584, 602; 99 S Ct 2493; 61 L Ed 2d 101 (1979).]

In addition, a presumption exists that "fit parents act in the best interests of their children." *Troxel, supra* at 68. Consequently, "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69. Historically, this is consistent with rulings by the United States Supreme Court indicating that the inherent nature of parenthood is comprised of the companionship of a child and the right to make decisions pertaining to the child's care, control, health, education, religious affiliations, and associations. See *Pierce v Society of Sisters,* 268 US 510, 534-535; 45 S Ct 571; 69 L Ed 1070 (1925); *Meyer v Nebraska,* 262 US 390, 399; 43 S Ct 625; 67 L Ed 1042 (1923).

Some jurisdictions have used these precepts regarding the dominance of parental authority to validate preinjury waivers to preclude liability. By way of example, the United States District Court for the District of Colorado has upheld the enforceability of a waiver signed by a parent on behalf of his minor child. *Brooks v Timberline Tours, Inc,* 941 F Supp 959 (D Colo, 1996). See, also, *Lantz v Iron Horse Saloon, Inc,* 717 So 2d 590 (Fla App, 1998). In Massachusetts, upholding a parental waiver permitting a minor to participate in a school cheerleading program, it was held: "In the circumstance of a voluntary, nonessential activity, we will not disturb this parental judgment. This comports with the

fundamental liberty interest of parents in the rearing of their children, and is not inconsistent with the purpose behind our public policy permitting minors to void their contracts." *Sharon v City of Newton,* 437 Mass 99, 109; 769 NE2d 738 (2002). Specifically, the court noted "[t]he enforcement of the release is consistent with the Commonwealth's policy of encouraging athletic programs for youth and does not contravene the responsibility that schools have to protect their students." *Id.* at 110-111. The *Sharon* court indicated that its decision to uphold the validity of the waiver was consistent with specific exceptions based on public policy embodied in statutory provisions exempting nonprofit and volunteer organizations from negligence liability for similar activities. *Id.* at 109.

Other jurisdictions, relying on public-policy concerns pertaining to the protection of the best interests of minors, have ruled preinjury exculpatory agreements invalid. Rejecting "the argument that a parental release of liability on behalf of a minor child implicates a parent's fundamental right to direct the upbringing of his or her child," the New Jersey Supreme Court in *Hojnowski v Vans Skate Park,* 187 NJ 323, 339; 901 A2d 381 (2006), instead emphasized that "the question whether a parent may release a minor's future tort claims implicates wider public policy concerns and the *parens patriae* duty to protect the best interests of children." The court opined that the need to protect children was not at odds and did not unnecessarily interfere "with the constitutionally protected right of a parent to permit or deny a child's participation in any or all of the recreational activities that may be available." *Id.* (quotation marks and citation omitted). Relying on the legislative enactments historically providing protection to children's interests, coupled with the need to "discourage negligent activity on the

part of commercial enterprises attracting children," the court held "that a parent's execution of a pre-injury release of a minor's future tort claims arising out of the use of a commercial recreational facility is unenforceable." *Id.* at 338.

The Utah Supreme Court, in *Hawkins v Peart,* 37 P3d 1062, 1066 (Utah, 2001), citing *Scott v Pacific West Mountain Resort,* 119 Wash 2d 484; 834 P2d 6 (1992), relied on the "premise that a parent may not unilaterally release a child's claims *after* a child's injury" to support its "conclusion that a parent does not have the authority to release a child's claims *before* an injury." (Emphasis in original.) Refusing to attribute validity to an executed release on the basis of the timing of the injury, the court explained its reasoning, stating, in relevant part:

> An exculpatory clause that relieves a party from future liability may remove an important incentive to act with reasonable care. These clauses are also routinely imposed in a unilateral manner without any genuine bargaining or opportunity to pay a fee for insurance. The party demanding adherence to an exculpatory clause simply evades the necessity of liability coverage and then shifts the full burden of risk of harm to the other party. Compromise of an existing claim, however, relates to negligence that has already taken place and is subject to measurable damages. Such releases involve actual negotiations concerning ascertained rights and liabilities. Thus, if anything, the policies relating to restrictions on a parent's right to compromise an existing claim apply with even greater force in the preinjury, exculpatory clause scenario. [*Hawkins, supra* at 1066.]

Similarly, the Colorado Supreme Court, in *Cooper v Aspen Skiing Co,* 48 P3d 1229, 1232 (Colo, 2002),[3] while

[3] We note that the *Cooper* case has subsequently been superseded by statute. See *Pollock v Highlands Ranch Community Ass'n, Inc,* 140 P3d 351 (Colo App, 2006).

recognizing the dissonance created between the "well-settled principle that '[a] minor during his minority, and acting timely on reaching his majority, may disaffirm any contract that he may have entered into during his minority' " and " 'our traditional regard for freedom of contract,' " ruled in accordance with public-policy concerns, which established "protections which preclude parents or guardians from releasing a minor's own prospective claim for negligence." *Id.* (citations omitted). The court opined that " 'since a parent generally may not release a child's cause of action after injury, it makes little, if any, sense to conclude a parent has the authority to release a child's cause of action prior to an injury.' " *Id.* at 1233 (citation omitted). As a result, the court ruled, in relevant part:

> Colorado's public policy disallows a parent or guardian to execute exculpatory provisions on behalf of his minor child for a prospective claim based on negligence. Specifically, we hold that a parent or guardian may not release a minor's prospective claim for negligence and may not indemnify a tortfeasor for negligence committed against his minor child. [*Id.* at 1237.]

B. WAIVER EXCEPTIONS

There appear to be two types of cases that recognize exceptions to the preclusion of a parent's unilateral authority to waive or release a child's claims before or even after an injury. The first type of case deals with specific, statutorily created exceptions, which restrict the forum for bringing a claim rather than provide an absolute waiver of any negligence. Typically, "a waiver executed by a parent on behalf of a minor is supported by public policy when it relates to obtaining medical care, insurance, or participation in school or community sponsored activities." *Fields v Kirton,* 961 So 2d 1127,

1129 (Fla App, 2007).[4] Distinguishing between the restriction or preclusion of "parents from deciding what activities may be appropriate for their minor children's participation" and "the effect of [a] release insulating the provider of the activity from liability for negligence inflicted upon the minor," the court in *Fields* opined that "[t]he decision to absolve the provider of an activity from liability for any form of negligence (regardless of the inherent risk or danger in the activity) goes beyond the scope of determining which activity a person feels is appropriate for their child." *Id.* Consequently, on the basis of the potential effect resulting from a parent's determination to execute a preinjury release of a minor child's property rights, the *Fields* court determined that the child's "rights cannot be waived by the parent absent a basis in common law or statute." *Id.* at 1130. Often, these cases involve waivers regarding the right to mediate or arbitrate disputes for potential or future injuries and have identified an important distinction between "[w]hether a parent may waive his or her child's substantive rights" and "whether a parent may agree that any dispute arising from the contract may be arbitrated rather than decided in a court of law." *Global Travel Marketing, Inc v Shea,* 908 So 2d 392, 401 (Fla, 2005). In these instances, the courts distinguish arbitration clauses from releases of liability:

> "[W]e note that the parent's consent and release to arbitration only specifies the forum for resolution of the child's claim; it does not extinguish the claim. Logically, if a parent has the authority to bring and conduct a lawsuit

[4] We note that the Florida Supreme Court accepted jurisdiction in this matter to address the question certified by the Florida District Court of Appeal:"Whether a parent may bind a minor's estate by the pre-injury execution of a release." *Fields, supra* at 1130; *Kirton v Fields*, 973 So 2d 1121 (Fla, 2007).

> on behalf of the child, he or she has the same authority to choose arbitration as the litigation forum." [*Id.* at 402, quoting *Cross v Carnes,* 132 Ohio App 3d 157, 169; 724 NE2d 828 (1998).]

The second type of exception used to uphold the validity of a preinjury waiver is reliant on public-policy arguments. Our research indicates that many jurisdictions engage in this type of compromise or hybrid, upholding the validity of certain releases or exculpatory agreements in limited or defined circumstances involving schools, religious organizations, and other public, nonprofit, or voluntary functions provided to children within communities. Courts have attempted to define the standards or elements to be used in making these determinations. By way of example, in *Tunkl v Univ of California Regents,* 60 Cal 2d 92, 99-101; 32 Cal Rptr 33; 383 P2d 441 (1963) (footnotes omitted), the court listed the criteria to be used for determining public-policy limitations on releases as follows:

> [T]he attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. [1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain

> protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

A more abbreviated version of the elements to be considered in these circumstances is provided in *Jones v Dressel,* 623 P2d 370, 376 (Colo, 1981), which states, in relevant part:

> In determining whether an exculpatory agreement is valid, there are four factors which a court must consider: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.

Notably, *Jones* cited the standard elucidated in *Tunkl* for determining "the existence of a duty to the public." *Id*.

In this line of cases, the focus of the courts is directed "not [on] whether the release violates public policy; but rather that public policy itself justifies the enforcement of [the] agreement." *Zivich v Mentor Soccer Club, Inc,* 82 Ohio St 3d 367, 370; 696 NE2d 201 (1998). Specifically, in *Zivich* the court summarized its concerns as follows:

> It cannot be disputed that volunteers in community recreational activities serve an important function. Organized recreational activities offer children the opportunity to learn valuable life skills. It is here that many children learn how to work as a team and how to operate within an organizational structure. Children also are given the chance to exercise and develop coordination skills. Due in great part to the assistance of volunteers, nonprofit organizations are able to offer these activities at minimal cost. . . . Clearly, without the work of its volunteers, these nonprofit organizations could not exist, and scores of children would be without the benefit and enjoyment of

> organized sports. Yet, the threat of liability strongly deters many individuals from volunteering for nonprofit organizations. Insurance for the organizations is not the answer, because individual volunteers may still find themselves potentially liable when an injury occurs. Thus, although volunteers offer their services without receiving any financial return, they place their personal assets at risk.
>
> Therefore, faced with the very real threat of a lawsuit, and the potential for substantial damage awards, nonprofit organizations and their volunteers could very well decide that the risks are not worth the effort. Hence, invalidation of exculpatory agreements would reduce the number of activities made possible through the uncompensated services of volunteers and their sponsoring organizations. [*Id.* at 371-372 (citations omitted).]

On the basis of this reasoning, the *Zivich* court opined that "public policy justifies giving parents authority to enter into these types of binding agreements on behalf of their minor children" and that "enforcement of these agreements may well promote more active involvement by participants and their families, which, in turn, promotes the overall quality and safety of these activities." *Id.* at 372. Consequently, the court, defining the parameters of the ruling, stated, in relevant part, that "parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities where the cause of action sounds in negligence. These agreements may not be disaffirmed by the child on whose behalf they were executed." *Id.* at 374. This same reasoning was acknowledged and adopted in *In re Royal Caribbean Cruises Ltd,* 459 F Supp 2d 1275, 1279-1280 (SD Fla, 2006), when the court refused to exonerate Royal Caribbean from liability on the basis of the execution of a waiver by the parent of a minor child. Citing with approval *Zivich* and other preinjury cases in various jurisdictions, the court distinguished their holdings

from the circumstances in the present action as involving "parental pre-injury releases executed for purposes of a minor's participation in nonprofit, community based, and/or school related activities rather than parental pre-injury releases related to private for profit activities." *Id*. at 1280.

VI. MICHIGAN

A. OVERVIEW

In analyzing the current status of the law in Michigan, our starting point is the well-recognized common-law premise, cited and adopted through a prolonged history of caselaw that "in Michigan a parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims of his or her child. Generally speaking, the natural guardian has no authority to do an act which is detrimental to the child." *Tuer v Niedoliwka,* 92 Mich App 694, 698-699; 285 NW2d 424 (1979). Caselaw in Michigan demonstrates adherence to this common-law precept, which places strict limitations on a parent's authority to compromise claims on behalf of the parent's minor child. By way of example, we note our Supreme Court's ruling in *O'Brien v Loeb,* 229 Mich 405, 408; 201 NW 488 (1924), involving injuries sustained by a 10-year-old child in a collision between an automobile and a horse-drawn wagon. Before initiation of trial, the child's mother purportedly accepted a sum in full settlement of her child's claims arising from the accident. Noting the absence of a "contract by the infant," the Court stated, in relevant part:

> The transaction was carried on entirely with the mother, who was without authority to bind him in the release of his cause of action against the defendants. An infant is not bound by a contract made for him or in his

> name by another person purporting to act for him, unless such person has been duly appointed his guardian or next friend and authorized by the court to act and bind him. [*Id.* (quotation marks and citation omitted).]

Despite recognition by our Court that "[t]he status of a parent is one of guardian by nature," courts in this state have consistently ruled that "[u]nless authorized by statute, a guardian is without power to bind the infant or his estate." *Reliance Ins Co v Haney,* 54 Mich App 237, 242; 220 NW2d 728 (1974). In *Reliance Ins Co*, this Court specifically determined that even the "natural guardian," or parent of the minor child, "may not consent to the surrender of life insurance which has been taken out for the benefit of the child." *Id.* This Court's ruling reflects public-policy concerns regarding the need to protect the rights of minor children as predominant to the inherent rights of their parents at least to the extent that a "guardian has no authority to do any act which is detrimental to his ward." *Id.* A detrimental act is construed as one that effectively abandons or compromises any right or interest belonging exclusively to the minor child. *Id.* at 243 (finding "[t]he very fact that [the child] was injured by an uninsured motorist and the insurer denies coverage on the basis of the father's waiver for the son indicates a detrimental act").

Limitations on parental authority, consistent with this common-law rule, have also been imposed in cases involving support of a minor child. For instance, "an illegitimate child's right to support from a putative father cannot be contracted away by its mother, and that any release or compromise executed by the mother is invalid to the extent that it purports to affect the rights of the child." *Tuer, supra* at 699. Caselaw has further emphasized restrictions on parental authority by recognizing a parent's right to stipulate or approve

an "annulment judgment" but precluding that agreement from affecting the rights of the minor children involved to a full hearing on the issue of paternity. *In re Kinsella Estate,* 120 Mich App 199, 203; 327 NW2d 437 (1982). Referencing public policy, this Court "has taken a dim view of agreements purporting to sign away the rights of a child, particularly when the result of such an agreement may be that the child becomes a public charge . . . ." *Van Laar v Rozema,* 94 Mich App 619, 624; 288 NW2d 667 (1980).

This overriding public-policy concern is demonstrated in procedures and rules mandating court oversight, which have been implemented to assure the protection of minors and their rights in postinjury cases. For example, MCR 2.420(A), consistently with the doctrine of *parens patriae,* delineates strict limitations on parental authority regarding settlements and judgments for minors. Specifically,

> MCR 2.420(A) provides that the rule applies only to settlements in cases "brought for a minor by a next friend, guardian, or conservator," which we read as further support for our holding that a parent has no authority to compromise an *unliquidated claim* or to liquidate a claim on behalf of a child absent the formal procedures and proper supervision suggested by the court rule. The obvious basis for such a rule is to ensure that the best interests of the minor child are protected by (1) the appointment of a next friend, guardian, or conservator to represent the minor *and* (2) the oversight of the trial court, or probate court, before an action is commenced, to scrutinize any proposal that compromises the minor's rights. [*Smith v YMCA of Benton Harbor/St Joseph*, 216 Mich App 552, 556; 550 NW2d 262 (1996) (emphasis in original).]

We note that even when court-imposed protections, such as the appointment of a guardian or next friend are in place, "[i]f the next friend . . . is a person who has

made a claim in the same action and will share in the settlement or judgment of the minor . . . then a guardian ad litem for the minor . . . must be appointed . . . to approve the settlement or judgment." MCR 2.420(B)(2). The implementation of such safeguards further demonstrates the overriding importance attributed to assuring the best interest of the child is maintained and is not compromised by any potential conflict of interest. See *Bowden v Hutzel Hosp,* 252 Mich App 566, 572-573; 652 NW2d 529 (2002), mod 468 Mich 851 (2003).

Various statutory provisions afford similar protections to minors, including but not limited to: (a) MCL 700.5102, which restricts the payment or delivery of property to minors not in excess of $5,000 in value unless certain safeguards are present; (b) MCL 700.5401, involving court appointment of a conservator or issuance of a protective order to ensure oversight in the management of a minor's estate; and (c) MCL 600.5851, tolling accrual of actions in order to preserve a child's rights to initiate certain causes of action, following removal of the disability of an individual's status as a minor.

These provisions function as checks on parental authority in an effort to ensure the protection of a minor child's interest by requiring the appointment of a conservator or guardian approved by the court to handle the minor's affairs, or by provision of additional time following attainment of the age of majority by a minor to exercise certain rights, rather than the automatic assumption of this role by a parent. The implementation of these provisions is indicative of an adherence to public policy, which favors the protection of the contractual rights of minors consistent with the common-law limitations placed on parental authority to compromise claims belonging to their children.

B. WAIVER EXCEPTIONS

Michigan, consistently with other jurisdictions, does permit specific statutory exceptions to the common-law rule of preclusion of parental authority regarding the release or waiver of children's rights. We note that such legislatively created exceptions are limited and strictly construed. "Because the common law may be abrogated by statute, a child can be bound by a parent's act when a statute grants that authority to a parent." *Benson v Granowicz,* 140 Mich App 167, 169; 363 NW2d 283 (1984). See, also, *Osborne v Arrington,* 152 Mich App 676, 679-680; 394 NW2d 67 (1986); *McKinstry v Valley Obstetrics-Gynecology Clinic, PC,* 428 Mich 167, 192-193; 405 NW2d 88 (1987) (recognizing the enactment of former MCL 600.5046[2] "changes the common law to permit a parent to bind a child to an arbitration agreement").

Currently, our Legislature has clearly identified certain, very specific situations in which parents are allowed to compromise the rights of their minor child. However, nothing has been discovered in the current statutory scheme that would permit a parent to release the property rights of his or her child in circumstances similar to those in this litigation. Specifically, this Court is aware of no legislative enactments upholding exculpatory agreements, executed by parents on behalf of their minor children before injury, that waive liability for injuries incurred in either commercial or nonprofit settings. Rather, given the preclusion of parental authority to compromise postinjury claims initiated on behalf of children without significant court oversight or the institution of legislatively created safeguards, it is counterintuitive to believe it acceptable or justifiable that inchoate rights or preinjury claims could be waived by parents, particularly given the absence of sufficient

factual information or informed negotiation in such preinjury circumstances.[5] Given the caselaw and the context of legislative enactments and safeguards, it is apparent that Michigan is particularly cautious when it comes to permitting the compromise of any child's rights and strictly adheres to the common-law preclusion of parental authority in these situations, recognizing only very limited and specific statutory exceptions to this general rule. Hence, in the absence of a clear or specific legislative directive, we can neither judicially assume nor construct exceptions to the common law extending or granting the authority to parents to bind their children to exculpatory agreements. Thus, the designation or imposition of any waiver exceptions is solely within the purview of the Legislature.[6]

I am particularly cognizant of the fact that to uphold the validity of preinjury waivers would afford minor children fewer protections than provided for postinjury claims, which statutorily require court oversight or approval for settlement. Concurrently, I acknowledge the public-policy concerns and reasoning underlying

[5] Contrary to the concurrences, I find the arguments validating preinjury waivers less persuasive than those regarding postinjury waivers based on (a) the absence of sufficient information to make informed decisions regarding waiver when an injury has not yet occurred, and (b) the importance of affording minors greater, or at least equivalent, protections, to those afforded in postinjury cases and to adults. In addition, I do not agree that our determination regarding the invalidation of preinjury waivers serves to undermine parental authority. Parents continue to retain decision-making authority regarding their child's participation in select activities. Our ruling only serves to assure that such determinations are fully informed in order to effectively balance any risks and benefits inherent in the chosen activities and to afford adequate protections from negligent behavior in the conduct of those activities.

[6] Further, I would strongly encourage the Legislature to evaluate this issue, including any distinctions to be acknowledged regarding treatment of preinjury waivers involving for-profit versus nonprofit organizations or programs.

distinctions developed in other jurisdictions pertaining to the validity of such waivers dependent on the nature of the activity engaged in regarding for-profit and nonprofit activities or services. However, even following the reasoning of other jurisdictions, the exceptions recognized in those cases are not applicable given the for-profit nature of defendant's business. Without specific legislative direction this Court is precluded from defining or implementing any such divergence from the common-law preclusion regarding the validity of any form of waiver by a parent on behalf of his or her minor child. Although there exists in this state a clear intention to give predominance to protecting the rights of minor children, "[t]he Michigan Legislature is the proper institution in which to make such public policy determinations, not the courts." *Huron Ridge LP v Ypsilanti Twp,* 275 Mich App 23, 45; 737 NW2d 187 (2007).

While this ruling has significant and far-reaching implications regarding practices routinely engaged in by organizations and businesses providing valuable services and activities for minor children and has the potential to increase litigation and affect the availability of programs to younger members of the community, I have no alternative but to recognize the current status of our law and follow its precepts. "It is not the function of the courts to usurp the constitutional role of the legislature and judicially legislate that which necessarily must originate, if it is to be law, with the legislature." *Fields, supra* at 1130.

C. CONCURRENCES

Contrary to the concerns expressed in my colleagues' respective concurrences, I welcome the potential for discourse and examination that may be occasioned by

our ruling in this case. While certain organizations may be required to reevaluate their services and delivery of activities as a result of our determination, I believe this is a small price to pay to protect the interests of the most vulnerable members of our society. Hopefully, our ruling will serve to disrupt the complacency, which has developed over the years, from the proliferation and pro forma acceptance of preinjury waivers and will serve to refocus and place liability where it belongs by removing the artificial protections afforded to organizations or businesses that are negligent in the provision of services to children. Further, while it may, from a social-policy perspective, be beneficial to exempt nonprofit and other specified organizations from preinjury liability, the establishment of protections for such groups is easily provided if our Legislature chooses to act. Our ruling is not significant because it may result in a disruption of the status quo regarding the complacent acceptance of the use of preinjury waivers for minors. Rather, the decision in this case is important because it serves as an affirmation of the priority we place on the protection of the health and well-being of our children.

D. CONCLUSION

Therefore, I would determine that preinjury waivers effectuated by parents on behalf of their minor children are not presumptively enforceable. Specifically, within the context of our state's overriding policy, and in the absence of any specific legislative exceptions permitting the waiver of liability by parents in these situations, the release signed on behalf of plaintiff's son cannot be construed as valid. Consequently, I would reverse the trial court's determination regarding the validity of the challenged waiver and remand the case for reinstatement of plaintiff's negligence claim. Because our ruling

determines that the waiver is invalid, I need not address the parties' contentions pertaining to the scope or parameters of the waiver's language and content.

VII. GROSS NEGLIGENCE

Defendant contends that the trial court erred in refusing to dismiss plaintiff's claim of gross negligence. "Gross negligence" is conduct that is so reckless that it demonstrates a substantial lack of concern for whether an injury results. *Xu v Gay,* 257 Mich App 263, 269; 668 NW2d 166 (2003). Evidence of ordinary negligence is insufficient to create a material question of fact regarding the existence of gross negligence. *Maiden, supra* at 122-123. The issue of gross negligence may be determined by summary disposition only where reasonable minds could not differ. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998).

Plaintiff contends that the failure of defendant to follow or implement the manufacturer's instructions regarding equipment to be used in conjunction with the slide and recommendations pertaining to adult supervision of its use constituted evidence of gross negligence. However, plaintiff ignores the fact that defendant did undertake certain actions to ensure the safety of its guests. It is undisputed that defendant's staff provided verbal instructions to the participants regarding safety and appropriate conduct or behavior before permitting use of the equipment and that certain rules regarding safe use of the equipment were posted. Further, plaintiff does not allege the minor children attending the party were completely unsupervised, only that insufficient supervision was provided. Considering the fact that defendant did undertake certain steps or precautions to prevent injury, there has been no demonstration that defendant possessed a substantial lack

of concern for the minor child's safety or well-being. Therefore, I would hold that the trial court erred by failing to grant summary disposition on plaintiff's claim of gross negligence. *Id.* at 151. Because I would determine that plaintiff's claim of gross negligence is not viable, I find no need to address defendant's assertion that it is entitled to summary disposition on the basis of a lack of proximate causation.

Subsumed within this issue are defendant's concomitant assertions that (1) the danger posed by jumping off the top of a slide is an open-and-obvious hazard, precluding the imposition of liability and (2) defendant did not have a duty to supervise the minor child given the presence of the child's parents at the time the injury occurred. I first address the assertion regarding the applicability of the open-and-obvious-danger doctrine.

As previously discussed by this Court, the applicability of the open-and-obvious-danger doctrine is dependent on the theory of liability presented and the nature of the duty that is at issue. *Hiner v Mojica,* 271 Mich App 604, 615; 722 NW2d 914 (2006). We have determined that this doctrine is applicable only to premises-liability actions and certain cases involving a failure to warn in product-liability cases. We have explicitly held the doctrine not to be applicable to claims of ordinary negligence. *Id.* at 615-616. When an injury develops from a condition of the land, rather than emanating from an activity or conduct that created the condition on the property, the action sounds in premises liability. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). Because this case comprises a claim of negligence and does not meet the definitional requirements of either a premises-liability or a product-liability action, the open-and-obvious-hazard doctrine is inapplicable. Because I find the doctrine inapplicable, I need

not reach a determination regarding the trial court's ruling precluding the use of the doctrine with regard to minor children below the age of seven on the basis of the legal precept that precludes the ability to impute negligence to individuals within this young age group.

Defendant also contends that the trial court erred in finding it had a duty to protect the minor child given the presence of his parents at the site at the time of the injury. I concur with the trial court's denial of summary disposition on this basis because the presence of the minor child's parents did not serve to abrogate defendant of its duty as the premises owner. Generally, " 'a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.' " *Bragan v Symanzik,* 263 Mich App 324, 330-331; 687 NW2d 881 (2004), quoting *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). Landowners owe minor invitees the highest duty of care. *Bragan, supra* at 335. Accordingly, defendant had a duty to exercise reasonable care to protect plaintiff's son and all the children attending the party from dangerous conditions, regardless of whether adults related to the children were present. However, I find that defendant's argument is misplaced because the cause of action arises in negligence rather than premises liability.

VIII. MICHIGAN CONSUMER PROTECTION ACT

Lastly, defendant argues that the trial court improperly failed to dismiss plaintiff's claim under the MCPA. Notably, plaintiff's complaint does not identify the specific sections of the MCPA claimed to have been violated. In general, plaintiff's allegations comprise assertions of misrepresentation or "deceptive represen-

tations" regarding the safety of its facility or equipment and the availability of supervision. Plaintiff further implied fraud or purposeful misrepresentation by suggesting defendant's purported waiver of liability was improperly "disguised in the form of an invitation." While not specified by plaintiff in his complaint, these allegations were discussed in greater detail in plaintiff's appellate brief, in which she asserted that defendant's misrepresentations pertaining to the safety of the facility, equipment, and supervision constituted violations of multiple subsections of MCL 445.903(1).

In general, the MCPA precludes the use of "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce . . . ." MCL 445.903(1). "Trade or commerce" is defined as the "conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity." MCL 445.902(1)(g). The intention underlying the act is " 'to protect consumers in their purchases of goods which are primarily used for personal, family or household purposes.' " *Zine v Chrysler Corp,* 236 Mich App 261, 271; 600 NW2d 384 (1999) (citation omitted). "The MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve its intended goals." *Forton v Laszar,* 239 Mich App 711, 715; 609 NW2d 850 (2000), overruled in part on other grounds *Liss v Lewiston-Richards, Inc,* 478 Mich 203 (2007). In order to have a valid MCPA claim presented, the "courts must examine the nature of the conduct complained of case by case and determine whether it relates to the entrepreneurial, commercial, or business" aspects of

the defendant's profession. *Nelson v Ho,* 222 Mich App 74, 84; 564 NW2d 482 (1997).

Plaintiff contends that defendant advertised itself as a safe and supervised facility, even though it purportedly knowingly violated safety recommendations set forth by the manufacturer of its equipment, and tried to deceptively obtain a waiver by providing free invitations that contained the waiver, in violation of the MCPA. The gravamen of plaintiff's claim is negligence because the allegations center on the way defendant operated the slide, not the manner by which it solicited or advertised its business. See *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (the gravamen of an action is determined by reading the claim as a whole). Further, plaintiff's claim that defendant tried to deceptively obtain a waiver is without merit. Plaintiff's mother received a copy of the document containing the waiver well in advance of the party and had ample opportunity to review it. Defendant made no attempt to disguise the waiver language. The wording of the invitation was sufficiently clear that no one would be permitted to participate in the event without a signed waiver. Therefore, I find that the trial court erred as a matter of law by failing to grant defendant summary disposition on this claim because the MCPA is not an appropriate basis upon which plaintiff can recover.

I would reverse and remand to the trial court for further proceedings consistent with this opinion. I would not retain jurisdiction.

BANDSTRA, P.J. (*concurring*). I concur with the lead opinion's conclusions that the trial court erred by not dismissing plaintiff's claim of gross negligence and that the trial court also improperly failed to dismiss plain-

tiff's claim under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Further, I reluctantly concur with the decision that we cannot enforce the waiver signed by the child's father. However, I think that result is wrong and write separately hoping that either the Michigan Legislature or our Supreme Court will further address the issue.

As the lead opinion's overview of Michigan caselaw illustrates, the rule has long been settled that a parent does not have the authority to release existing claims that a child might have on the basis of events that have already occurred. This "postinjury" rule abrogating parental waivers has been extended to preinjury waivers, such as the one at issue here, by courts of some of our sister states who see little difference between the two contexts. See, e.g., *Cooper v Aspen Skiing Co*, 48 P3d 1229, 1233 (Colo, 2002), quoting *Scott v Pacific West Mountain Resort*, 119 Wash 2d 484, 494; 834 P2d 6 (1992) (" '[S]ince a parent generally may not release a child's cause of action after injury, it makes little, if any, sense to conclude a parent has the authority to release a child's cause of action prior to an injury.' ").

There is no Michigan precedent explicitly discussing whether the postinjury rule against parental waivers should apply in a preinjury case. However, in a case involving a preinjury waiver, our Supreme Court in its analysis of whether that waiver should be enforced, recognized "the common-law rule that a parent has no authority to waive, release, or compromise claims by or against a child." *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 192; 405 NW2d 88 (1987). Considering that language to be binding on us, I am constrained to agree with the lead opinion that this result must apply in the matter before us.

Nonetheless, *McKinstry* certainly did not consider the logic of extending the postinjury waiver invalidation rule to preinjury waivers. Further, contrary to those courts that simply see no difference between the two contexts, other courts and commentators have suggested that important differences exist, making extension of the invalidation rule to preinjury cases inappropriate.

> "The concerns underlying the judiciary's reluctance to allow parents to dispose of a child's existing claim do not arise in the situation where a parent waives a child's future claim. A parent dealing with an existing claim is simultaneously coping with an injured child; such a situation creates a potential for parental action contrary to that child's ultimate best interests.
>
> "A parent who signs a release before her child participates in a recreational activity, however, faces an entirely different situation. First, such a parent has no financial motivation to sign the release. To the contrary, because a parent must pay for medical care, she risks her financial interests by signing away the right to recover damages. Thus, the parent would better serve her financial interests by refusing to sign the release.
>
> "A parent who dishonestly or maliciously signs a preinjury release in deliberate derogation of his child's best interests also seems unlikely. Presumably parents sign future releases to enable their children to participate in activities that the parents and children believe will be fun or educational. Common sense suggests that while a parent might misjudge or act carelessly in signing a release, he would have no reason to sign with malice aforethought.
>
> "Moreover, parents are less vulnerable to coercion and fraud in a preinjury setting. A parent who contemplates signing a release as a prerequisite to her child's participation in some activity faces none of the emotional trauma and financial pressures that may arise with an existing claim. That parent has time to examine the release, consider its terms, and explore possible alternatives. A parent

> signing a future release is thus more able to reasonably assess the possible consequences of waiving the right to sue." [*Zivich v Mentor Soccer Club, Inc*, 82 Ohio St 3d 367, 373; 696 NE2d 201 (1998), quoting Note, Scott v Pacific West Mountain Resort: *Erroneously invalidating parental releases of a minor's future claim*, 68 Wash L R 457, 473-474 (1993).]

These considerations are persuasive and I would conclude that, whatever the merits of abrogating postinjury parental waivers, there is no reason to extend that abrogation to preinjury waivers.

Moreover, to do so further undermines the authority of parents to make judgments and decisions regarding the activities in which their children should participate. As the United States Supreme Court reasoned in *Parham v J R*, 442 US 584, 602; 99 S Ct 2493; 61 L Ed 2d 101 (1979), "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." Thus, a court should be extremely hesitant "to inject itself into the private realm of the family" by questioning the ability of a parent "to make the best decisions concerning the rearing of that parent's children." *Troxel v Granville*, 530 US 57, 68-69; 120 S Ct 2054; 147 L Ed 2d 49 (2000); accord *Sharon v City of Newton*, 437 Mass 99, 108; 769 NE2d 738 (2002) ("[W]ith respect to matters relating to [their children's] care, custody, and upbringing [parents] have a fundamental right to make those decisions for them."). Instead, that parental privilege and authority should be respected by the courts, as it was in *Zivich*:

> When Mrs. Zivich signed the release she did so because she wanted Bryan to play soccer. She made an important family decision and she assumed the risk of physical injury on behalf of her child and the financial risk on behalf of the

> family as a whole. Thus, her decision to release a volunteer on behalf of her child simply shifted the cost of injury to the parents. Apparently, she made a decision that the benefits to her child outweighed the risk of physical injury. *Mrs. Zivich did her best to protect Bryan's interests and we will not disturb her judgment.* [*Zivich*, *supra* at 374 (emphasis added).]

Similar decisions were made by the child's father here,[1] and we should not undermine them by allowing this lawsuit to proceed.

Finally, I agree with the lead opinion that our decision today has significant and far-reaching implications. As this case amply demonstrates, ours is an extremely and increasingly litigious society.[2] Any entity that provides an educational, recreational, or entertainment opportunity to a minor does so at great risk of having to defend an expensive lawsuit, meritorious or not. To avoid some of that, preinjury waivers have become commonplace. If the law does not honor those waivers, the implications appear inevitable: the cost of providing opportunities will rise, some families who would like their children to participate will no longer be able to afford to, and, ultimately, some opportunities will simply become unavailable altogether. See, e.g., *Hohe v San Diego Unified School Dist*, 224 Cal App 3d 1559, 1564; 274 Cal Rptr 647 (1990) (upholding a parental waiver while noting that the availability of recreational and sports activities for children are steadily decreasing).

Because of the impact of today's decision and the compelling arguments against abrogating preinjury pa-

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[1] There is no argument that the waiver was unclear or that the child's father did not read and understand it.

[2] Children have routinely jumped off playground slides for generations; lawsuits seeking to impose damages on someone else for resulting injuries are only a recent phenomenon.

rental waivers, I encourage the Michigan Legislature or Supreme Court to further consider the issue.

SCHUETTE, J. (*concurring*). First, I concur with my distinguished colleague, Judge TALBOT, in his lead opinion that plaintiff did not establish that defendant's conduct was grossly negligent, that the Michigan Consumer Protection Act, MCL 445.901 *et seq*., has no applicability to this case, and that the facts, circumstances, and pleadings of this case do not involve a premises-liability action.

I further concur, although reluctantly, in the conclusion reached by Judge TALBOT that judicial precedent in the state of Michigan requires this reviewing court to invalidate the preinjury waiver of liability signed by the minor child's father in this case. I also strongly share the sentiments expressed in the concurring opinion of my distinguished colleague, Judge BANDSTRA. I write separately to emphasize several issues of extreme legal and policy significance that should be addressed as a consequence of this decision.

Plaintiff's claim concerning the validity of a preinjury, parental waiver of liability for a minor is a newly emerging issue for our courts. As described in Judge TALBOT's thorough lead opinion, courts across the United States are grappling with this issue, and now it is Michigan's turn. I believe that under *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 192; 405 NW2d 88 (1987), we are required to invalidate a preinjury, parental waiver of liability to a minor child.

In *McKinstry*, a preinjury waiver case, our Supreme Court determined that a mother could bind her unborn child to arbitration under § 5046(2) of the Medical

Malpractice Arbitration Act (MMAA), MCL 600.5046(2).[1] Our Supreme Court stated:

> Our interpretation of § 5046(2) is a departure from the common-law rule that a parent has no authority to waive, release, or compromise claims by or against a child. *Schofield v Spilker*, 37 Mich App 33; 194 NW2d 549 (1971); *Reliance Ins Co v Haney*, 54 Mich App 237; 220 NW2d 728 (1974); 67A CJS, Parent and Child, §114, pp 469-470. However, the common law can be modified or abrogated by statute. *Bean v McFarland*, 280 Mich 19; 273 NW 332 (1937); *O'Brien v Hazelet & Erdal*, 410 Mich 1; 299 NW2d 336 (1980). Thus, a child can be bound by a parent's act when a statute grants that authority to a parent. *Reliance Ins Co*, *supra*, p 242; *Wilson v Kaiser Foundation Hospitals*, 141 Cal App 3d 891; 190 Cal Rptr 649 (1983). We believe that § 5046(2) of the MMAA changes the common law to permit a parent to bind a child to an arbitration agreement. [*McKinstry*, *supra* at 192-193.]

Some might argue that the above-referenced quotation is dictum and hence not binding on lower courts in Michigan.[2] Or, some might contend that the plain meaning and use of the word "claim" by our Supreme Court in *McKinstry* may only be interpreted to apply to postinjury waivers, because a claim can only occur after, not before, an injury has been caused.[3] Yet,

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[1] MCL 600.5046(2) was repealed by 1993 PA 78, effective October 1, 1993.

[2] Dictum is " ' "judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." ' " *Carr v City of Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003) (citations omitted).

[3] A claim is defined as:

> 1. The aggregate of operative facts giving rise to a right enforceable by a court . . . . 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional . . . . 3. A demand for money or property to which one asserts a right . . . . [Black's Law Dictionary (7th ed), p 240.]

in *McKinstry*, our Supreme Court stated that "the common law can be modified or abrogated by statute," *McKinstry*, *supra* at 192, seemingly implying that, in the absence of a statute to the contrary, Michigan adheres to the common-law rule prohibiting parental waiver of liability in preinjury, as well as postinjury, situations.

The decision in this case is bound to have enormous consequence and profound impact throughout Michigan. Of equal significance will be our Supreme Court's review of this decision, given the dearth of preinjury, parental-waiver-of-liability cases in Michigan and the wide variety of rulings emerging in other jurisdictions throughout the federal and state courts of this nation. See, e.g., *Brooks v Timberline Tours, Inc*, 941 F Supp 959 (D Colo, 1996); *Lantz v Iron Horse Saloon, Inc*, 717 So 2d 590 (Fla App, 1998); *Sharon v City of Newton*, 437 Mass 99; 769 NE2d 738 (2002); *Hojnowski v Vans Skate Park*, 187 NJ 323; 901 A2d 381 (2006); *Zivich v Mentor Soccer Club, Inc*, 82 Ohio St 3d 367; 696 NE2d 201 (1998). Of similar importance is the manner and speed with which the Michigan Legislature responds to this public-policy issue, given the absence of any statute codifying the validity and scope of preinjury, parental waivers of liability for a minor. Most certainly, legislators will come to hear about the impacts of this decision from constituents and interest groups of every competing philosophy and occupation.

Certainly, no one in the Michigan judiciary desires to turn a deaf ear or a blind eye to wayward businesses, dishonorable nonprofit organizations, or volunteer groups that might place a child in a dangerous situation, notwithstanding a parent's executing a release and waiving liability for resulting injury. Equally significant is the fact that an immense amount of youth

activities—church groups, Boy Scouts, sports camps of all kinds, orchestra and theatrical events, and countless school functions—run and operate on release and waiver-of-liability forms for minor children.[4]

Voices will be heard, as this Court heard during oral argument, that no court of law should acquiesce to a piece of paper protecting a business, nonprofit organization, or school group from liability when a child is injured. Equally strong will be the chorus of church, school, and volunteer organizations, and passionate parents, decrying the "chilling effect" of the invalidation of preinjury waivers, freezing out adult volunteers from participating in youth activities and camps of all kinds, with a Sword of Damocles,[5] liability speaking, lurking in the weeds or hanging over their heads.

But in the end, the Michigan Legislature will have to determine whether a statutory exception to the common-law rule for preinjury waivers should be adopted, and whether there should be any differentiation between for-profit and nonprofit groups as some states have seen fit to do. See *Sharon*, *supra* at 109-110; *Zivich*, *supra* at 372; *Hohe v San Diego Unified School Dist*, 224 Cal App 3d 1559, 1564; 274 Cal Rptr 647 (1990). I hope that the Michigan Legislature acts thoroughly and promptly.

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[4] Appended to this opinion are but a few examples of preinjury, parental waivers, which demonstrate their widespread use. Such waivers are used by youth and community organizations, universities, and nonprofit groups for an immense array of activities across Michigan, including: Arcadia Daze 5K Run (Appendix A), SpringHill Summer Camps (Appendix B), Jeff Trickey Quarterback Camps (Appendix C), University of Michigan Gymnastics Camp (Appendix D), Ann Arbor YMCA (Appendix E), Detroit Free Press/Flagstar Marathon (Appendix F), and Wayne State University Mort Harris Recreation and Fitness Center Youth Fitness Camp (Appendix G).

[5] The "Sword of Damocles" was a sword suspended over the head of Damocles in a Greek myth. Wikipedia <http://en.wikipedia.org/wiki/Sword_of_Damocles_%28disambiguation%29> (accessed July 29, 2008).

APPENDIX A

ARCADIA DAZE RUN WAIVER

I know that participating in a foot race is a potentially hazardous activity. I should not enter unless I am medically able. I assume all risks associated with participation in this event, including, but not limited to: falls, contact with other participants, the effect of the weather, traffic, and the condition of the road, with all such risks being known and appreciated by me. Having read the waiver and knowing these facts and in consideration of you accepting my entry, I, for myself and anyone entitled to act on my Benalf, waive and release the Arcadia Lions Club, and all other sponsors, their representatives and successors from all claims of liabilities of any kind arising out of my participation in this event. I grant permission to all of the foregoing to use any photographs, motion pictures, recording, or any other record of this event for any legitimate purpose.

_____
Signature

Parent Signature if under 18 years of age

_____
Date

Sponsored by Arcadia Lions Club and made possible with financial support by B.J Hopwood, Inc., General Contractor

May copy this form.

APPENDIX B

SpringHill Summer Camps 2008 Registration Form | g2g! | Please photocopy if you need more than one card.

FAMILY INFORMATION

Camper First Name | Camper Last Name | Birth date | Grade Completed (by August) | Gender | Camper Email

Parent or Guardian's Full Name | Spouse's Name | Father Cell Phone | Mother Cell

Street Address | City | State | Zip Code | County

Home Phone | Business Telephone (indicate whose) | Parent Email Address

Confirmations will be sent to the parent email address unless USPS mail is requested here: ☐

Camper's previous camp attendance: ☐ Michigan Camps ☐ Indiana Camps ☐ Day Camp ☐ None

Please enter the week and program for your first two choices below:

1st Choice: ☐ Michigan ☐ Indiana	2nd Choice: ☐ Michigan ☐ Indiana	TST 1st Choice: ☐ Michigan ☐ Indiana	TST 2nd Choice: ☐ Michigan ☐ Indiana
Week _____	Week _____	Program Number _____	Program Number _____
Program _____	Program _____	(from Schedule)	(from Schedule)

Roommate Choices: (No more than 3 friends together in one cabin.)

Roommate 1 | Roommate Email Address | Roommate 2 | Roommate Email Address

BILLING INFORMATION

Please choose one of the following 4 payment options. (U.S. dollars only) Your signature authorizes your $150 deposit as well as automatic collection of your balance due on April 21, 2008 using the same payment method. It may take up to 5 days to process.

Signature _____ (Without your signature it will not be possible for us to process your registration)

A $150 deposit is required to register. If cancellation is made prior to May 1st, 2008, $75 is non-refundable. Cancellations after May 1st, 2008 up till 21 days prior to camp start date will result in forfeiture of $150. Cancellations within 21 days prior to camp start date will result in forfeiture of one half the cost of camp. No-shows for a scheduled camp will result in forfeiture of the full camp fee.
Cancellation must be requested in writing (mail, email or fax).

Camp Deposit/Fee enclosed or authorized: $_____ Spending Money enclosed or authorized: $_____ (Registrations made after April 21 will require full payment.)

☐ 1. Electronic transfer from checking account: _____
Bank Name | Bank Transit/Routing Number | Bank Account Number

☐ 2. Check Enclosed. (Your check will be processed as an EFT as well as the remaining balance on April 21, 2008. It may take up to 5 days to process)
NOTE: In an effort to keep camp costs down, we would prefer that you would use a credit/debit card as your last option of payment.

☐ 3/4. Debit/Credit Card: ☐ Visa ☐ MasterCard ☐ Discover _____
Credit Card Number | Expiration | Name on Card (please print)

SPECIAL NEEDS?

Does your camper have any physical, emotional, mental, or behavioral challenges which have been professionally diagnosed, or are under evaluation? ☐Yes ☐No
Does your camper currently receive special assistance at school ? ☐Yes ☐No
Will your camper potentially require special attention in order to participate in normal camp activities? ☐Unsure ☐Yes ☐No

Please indicate the severity of all applicable conditions: ❶ Mild ❷ Moderate ❸ Severe

(1)(2)(3) Aspergers (1)(2)(3) Tourette Disorder
(1)(2)(3) Autism (1)(2)(3) Seizure Disorder
(1)(2)(3) ADD/ADHD (1)(2)(3) Asthma
(1)(2)(3) Bone/Joint/Muscle (MDS/CP/Other)
(1)(2)(3) Hearing Impaired (1)(2)(3) Food Allergies: _____
(1)(2)(3) Blind/Legally Blind (1)(2)(3) Other: _____
(1)(2)(3) Behavior Concerns: _____
(1)(2)(3) Emotional Concerns: _____

Additional Information:

We want to make sure that each child receives the level of attention needed to provide an incredible, inclusive, camp experience. Our staff will contact you if there is concern that your camper's needs may require additional assistance from our staff, or potentially exceed our ability to provide exceptional care to him/her and others.

LIMITED PURPOSE POWER OF ATTORNEY

I. Consent to Treatment of a Minor

A. By signature below, the undersigned appoints Michael Perry, Todd Leinberger, Bill Dinsmore, Craig Soderdahl, or Andrew Sitte each to act alone, or delegate to another person, the power to consent on our behalf to all emergency treatment and/or medical care (except elective surgery) determined necessary or desirable by the attending physician at the hospital.

B. This Power of Attorney shall continue until revoked by the undersigned, or until August 15, 2008, whichever is earlier. Physicians or the hospital's medical staff may assume and rely on this authorization being current and in effect during such period unless notified otherwise.

C. The undersigned certify that they have read this Power of Attorney (or had it read to them), that they understand this Power of Attorney and sign it voluntarily.

II. Release and Indemnity Agreement for SpringHill Participants (Age 17 and under)

By signature below, I certify the following: (1) that my child's participation in SpringHill activities and programs, and my authorization of my child's participation in SpringHill activities and programs, is completely voluntary, and (2) that I have familiarized myself with the SpringHill activities and programs in which my child will be participating. I further recognize and have instructed my child in the importance of knowing and abiding by SpringHill's rules, regulations and procedures for the safety of camp participants, and (3) I understand that SpringHill reserves the right to refuse admission to any camper that they feel could be a detriment to any other campers.

I recognize that certain hazards and dangers are inherent in camping and sporting events and in the activities and programs conducted by SpringHill, including, more specifically, but not limited to, the activities of horseback riding, swimming, blobbing, rock climbing, zipline, paintball, rappelling, and extreme sports. I acknowledge that although SpringHill has taken safety measures to minimize the risk of injury to camp participants, SpringHill cannot insure nor guarantee that the participants, equipment premises and/or activities will be free of hazards, accidents and/or injuries. Moreover, I understand that participation in any such activities may involve the risk of injury and loss, both to the person and to property, and that the risks may include the possibility of permanent disability or death. I assume all such risks connected with my child's participation in SpringHill activities and programs.

I understand that in the unlikely event of a serious illness or injury, every effort will be made to notify the parent or legal guardians at the earliest possible time without jeopardizing the care of the camper or minor staff. Parents or guardians will be notified if their child receives treatments for an injury/illness that requires a physician.

I understand that there may be elements of risk associated with activities at camp. I give permission for my child to participate in all activities at camp and hereby release and agree to indemnify and hold harmless SpringHill and its trustees, officers, employees, agents, and volunteers from any and all claims of any nature arising from such participation.

III. Photo Release

Photographs and video footage of my child as a result of participation in activities at SpringHill may be used in SpringHill's promotional materials or website.

Date: Month _____ Day _____, 2008

Parent or Guardian's Legal Signature _____ (Signature required for admittance into Summer Camp)

APPENDIX C

Jeff Trickey Quarterback Camps

2008 QUARTERBACK CAMP APPLICATION FORM

My son has my permission to attend the JEFF TRICKEY QB CAMP. I certify that within the past two years, he has had a physical examination and that now, he is physically able to participate in football camp activities without restriction. In the event of an illness or injury, I give my consent for medical treatment and

permission to attending physician to hospitalize, secure proper treatment, and order injections, anesthesia, or surgery. I will be responsible for any medical or other charges in connection with my son's attendance in camp.

I acknowledge that at the JEFF TRICKEY QB CAMP my son will participate in a sport that may involve, among other things, physical contact of the body with other persons or objects, including the ground, and that at the JEFF TRICKEY QB CAMP, he may incur a risk of injury. I specifically waive, give up and release the JEFF TRICKEY QB CAMP and staff from liability for any claim for damages which I or my son may have for injuries or illness that he may sustain at camp.

Camper Signature:_____

Parent's Signature:_____

NO PLAYER WILL BE ACCEPTED WITHOUT PARENTAL APPROVAL

APPENDIX D

Important Michigan Gymnastics Camp Information:

Parent/Guardian Consent, Medical Release and Release from Liability Agreement

Please read the following information carefully before signing.
All blanks must be completed. Please read the following information carefully before signing.

Activity: _____ Activity Time Period: _____

Activity Sponsor: _____

Participant Name: _____

Parent/Guardian Name(s): _____

In consideration for allowing Participant to participate in Activity, I/we, as parents and/or guardians of Participant, agree to the following:

Authorize Participant to participate in the Activity for the Activity Time Period stated above.

Release, indemnify and hold harmless the Activity Sponsor and University from any and all damages, except for damages caused by the sole gross negligence or intentional misconduct of Activity Sponsor or University, arising out of the participation of Participant in the Activity.

Prior to the commencement of the Activity, I/we were made aware of the nature of the Activity, had sufficient opportunity to inquire further, and understand the Activity has inherent risks and I/we and Participant assume, on behalf of Participant, all those inherent risks.

While participating in the Activity, Participant is subject to the policies, rules and regulations of the University and Activity Sponsor. Possession of fireworks, explosives, any weapon, illegal drugs or alcohol is prohibited and cause for immediate expulsion from the Activity. Further, any Participant repeatedly disobeying University or Activity Sponsor policies, rules or regulations may be expelled from the Activity.

Authorize Activity Sponsor, its employees, clinicians, trainers, nurses and agents (collectively, "Activity Sponsor") the authority to seek, obtain, and approve any medical care and treatment including, but not limited to x-ray examination, anesthetic, medical, dental or surgical diagnosis, or treatment and medical care which may be recommended and provided under the general supervision of any physician or surgeon, for Participant which, in their judgment, is necessary for the health and well-being of Participant during his/her participation in the Activity. I/We further agree that I/we are(am) solely responsible for any costs incurred and agree to hold the Activity Sponsor and the Regents of the University of Michigan, their employees and agents (collectively, "University") harmless for any liability arising out of any good faith action taken in obtaining medical treatment for Participant.

The above agreements are binding upon us, our estates, heirs, representatives and assigns.

Parent/Guardian Signature _____ Date _____

Parent/Guardian Signature _____ Date _____

Participant Signature _____ Date _____

APPENDIX E

Ann Arbor YMCA School Age Permission Form

FIELD TRIP/TRANSPORTATION PERMISSION
I give permission for my child _____, to be transported by the Ann Arbor YMCA from his/her school to the YMCA on the days he/she is registered to attend. I give permission for my child to go on any field trips supervised by the Ann Arbor YMCA Child Care Staff. I understand that many trips consist of short walks to nearby locations. I understand further that I will be notified in advance about any longer trips and that, if any vehicle is used to transport my child, each child will be required to wear a seat belt or be placed in a car seat that I would provide.

Parent/Guardian Signature_____ Date_____

PHOTOGRAPHY AND RECORDING PERMISSION
I hereby irrevocably release, consent and allow the Ann Arbor YMCA and its agents to use my child's photograph/likeness/voice, as it pertains to participation with the YMCA, in any manner for promotional efforts without expectation of any reimbursement in connection with its use.

Parent/Guardian Signature_____ Date_____

LIABILITY
I understand the physical activities which my child may participate in at the YMCA include, but may not be limited to: swimming, running, playing and sports. I agree to assume all liability and release the YMCA from any liability for the risk of injury, illness or death on account of my child's presence in a YMCA facility or on account of my child's involvement in any activity at a YMCA facility or at the sponsored activity.

Parent/Guardian Signature _____ Date _____

SWIMMING
I give permission for my child _____, to participate in the YMCA Youth Aquatics Program. A kindergartner or school-aged child may participate in youth recreation swim when available.

Parent/Guardian Signature_____ Date_____

SUNSCREEN/BUG SPRAY
My child (circle one) **should** **should not** wear sunscreen while being outdoors. Please apply first application at home. Sunscreen should be supplied by you, the parent. I understand that selecting "should" allows staff to apply sunscreen to my child. This does not guarantee application.

My child (circle one) **should** **should not** wear bug spray while being outdoors. Please apply first application at home. Bug spray should be supplied by you, the parent. I understand that selecting "should" allows staff to apply bug spray to my child. This does not guarantee application.

Parent/Guardian Signature_____ Date_____

PHYSICAL HEALTH
I hereby attest that my child_____is in good health. Further more any activity restrictions, allergies, medications taken by the child, or any other needs are listed in the Child Information Record. Immunization records or appropriate waivers are up to date and on file with my child's school.

Parent/Guardian Signature_____ Date_____

APPENDIX F

Detroit Free Press/Flagstar Marathon: - October 19, 2008
Registration Fees | *Registration Form*

Release:

In consideration of your accepting this entry, I hereby, for myself, my heirs, executors and administrators, waive and release any and all rights and claims for liability and damages I may have against the Detroit Free Press/Flagstar Marathon ("Marathon"), its employees, agents, officers, governors, sponsors and volunteers, Detroit Free Press, Inc., Flagstar, Detroit Newspaper Partnership, the Cities of Detroit and Windsor, USA Track and

Printable Release

Name of Parent/Guardian:
required if participant is under 18
By entering my name above, I represent that I, as a valid parent/guardian, am completing this form and agree to the above waiver/release.

I Accept | Do Not Accept

Detroit Free Press/Flagstar Marathon Waiver/Release

In consideration of your accepting this entry, I hereby, for myself, my heirs, executors and administrators, waive and release any and all rights and claims for liability and damages I may have against the Detroit Free Press/Flagstar Marathon ("Marathon"), its employees, agents, officers, governors, sponsors and volunteers, Detroit Free Press, Inc., Flagstar, Detroit Newspaper Partnership, the Cities of Detroit and Windsor, USA Track and Field, and their representatives, successors and assigns, for any and all injuries or death suffered by me in or arising from said event. I acknowledge that it is my responsibility to understand the risks and determine whether I am fit to safely complete this event and the precautions I should take. I attest and certify that my physical condition and ability to safely complete this event have been verified by a licensed medical doctor (except where the latter is in violation of religious principles); and that I am physically fit and have sufficiently trained to complete this and future competitions. I grant to the Marathon and its sponsors and licensees the exclusive right to the free use of my name, voice and/or picture in any broadcast, telecast, advertising, promotion or other account of this event. I acknowledge that my entry fee is non-refundable and non-transferable, even if the race is cancelled. I agree that any legal claim or dispute arising out of or in any way relating to my participation in this event will be governed by the laws of Michigan and will be adjudicated exclusively by and in the Courts of Michigan.

The registrant acknowledges that MarathonGuide.com/Web Marketing Associates has no responsibility for the operation of the Detroit Free Press/Flagstar Marathon and associated events and is only acting as an agent to register applicants who wish to participate in the Detroit Free Press/Flagstar Marathon and associated events. Accordingly, the registrant agrees to hold MarathonGuide.com/Web Marketing Associates and its agents harmless from any liability or injury resulting from the Detroit Free Press/Flagstar Marathon and associated events. Furthermore, the registrant agrees that it shall have no claim against MarathonGuide.com/Web Marketing Associates for any injury that may occur during the Detroit Free Press/Flagstar Marathon and associated events. The individual event operators and sponsors have provided information included in this site and MarathonGuide.com/Web Marketing Associates does not verify the accuracy or completeness thereof. All confirmed orders are final once payment is submitted. MarathonGuide.com/Web Marketing Associates does not issue refunds.

APPENDIX G

WAIVER AND RELEASE STATEMENT. All exercise and participation is done at the risk of the participant (s). Wayne State University, its employees and agents are not liable for personal injury. By signing this form, I am releasing Wayne State University, its employees and agents from any and all claims for injuries, including bodily injury, damages and property loss the participant (s) might sustain through participation in any Wayne State University Recreation and Fitness Center programs. I understand that it is my responsibility to obtain medical clearance for the participant (s) if necessary and that I will be personally responsible for the cost of any medical expenses incurred by the participant (s) as a result of participating in any Recreation and Fitness Center activities. This Waiver and Release is binding on my and the participant's heirs, administrators, executors, successors and assigns. In the event that the participants (s) require emergency treatment and neither I nor the designed emergency contact can be reached, then I consent to the provision of emergency treatment by a licensed physician or hospital. I have read and understand this paragraph. I gave Wayne State University, its employees and agents the irrevocable right to use my child's, picture, portrait, or photograph in all forms and media and in all manners, including composite, for advertising, for publication or any other lawful purposes, and I waive any right to inspect or approve the finished product, including written copy, which may be created in connection herewith.

Signature Date

Printed Name

BERKEYPILE v WESTFIELD INSURANCE COMPANY

Docket No. 274177. Submitted January 9, 2008, at Grand Rapids. Decided August 12, 2008, at 9:05 a.m. Leave to appeal sought.

Mary I. Berkeypile was injured in an automobile accident and brought an action against three of the drivers involved. After those drivers settled with Berkeypile, she brought an action in the Jackson Circuit Court against Westfield Insurance Company and Allied Property and Casualty Insurance Company, seeking recovery of uninsured-motorist benefits in connection with two unidentified hit-and-run drivers. Westfield, which insured the company car that Berkeypile was driving, moved for summary disposition, arguing in part that Berkeypile was not entitled to those benefits because she had received settlement amounts that exceeded the policy limit for uninsured-motorist coverage. The court, Charles A. Nelson, J., granted Westfield summary disposition, and Berkeypile appealed.

The Court of Appeals *held*:

The trial court erred by granting summary disposition to Westfield. While the trial court ruled as a matter of law that the uninsured-motorist coverage limit must be reduced by the aggregate of the settlements, the policy contains no language supporting the court's ruling reducing benefits, which left Westfield with no obligation to pay uninsured-motorist benefits. The language in the uninsured-motorist endorsement, including the policy's anti-duplication clause, prohibits the insured from receiving duplicate payments for the same noneconomic and excess economic losses or damages, which prevents overcompensation for losses. Trial has not yet occurred in this case, but Westfield would be liable for uninsured-motorist benefits equal to the difference by which any overall damages award exceeds the sum of the settlement proceeds, subject to the policy limit and any allocation of fault by the trier of fact.

Reversed and remanded.

Donald M. Fulkerson for Mary I. Berkeypile.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Deborah A. Hebert*), for Westfield Insurance Company.

Before: DAVIS, P.J., and MURPHY and WHITE, JJ.

MURPHY, J. Plaintiff, Mary I. Berkeypile, appeals by leave granted the trial court's order granting summary disposition in favor of defendant, Westfield Insurance Company, pursuant to MCR 2.116(C)(10) in this action involving the interpretation of an insurance policy issued by Westfield. Plaintiff was injured in a multiple-vehicle accident. The chief question posed to us is whether, under the pertinent language of the policy, plaintiff still has the potential right to recover uninsured motorist (UM) benefits from Westfield even though plaintiff previously received, through separate litigation against three of the drivers involved in the accident, settlement proceeds exceeding the $300,000 policy limit set forth in the UM endorsement of the Westfield policy. Stated another way, the issue is whether the settlement proceeds should be offset against the total amount of damages, not yet determined, or offset against the UM policy limit of $300,000 without any consideration of possible damages, which, given the amounts of the policy limit and the settlement proceeds, would eliminate any liability on Westfield's part under the policy. The trial court ruled, as a matter of law, that the policy limit must be reduced by the aggregate of the settlements, leaving Westfield with no obligation to pay plaintiff UM benefits. We reverse and remand, holding that there is no language in the policy supporting the trial court's benefits-reduction ruling and that the language in the UM endorsement dictates that any offset pertains only to duplicate payments for the same noneconomic and excess economic losses. Westfield would be liable for UM benefits equal to the difference by which any overall damages award exceeds the sum of the settlement proceeds, subject to the policy limit and any allocation of fault made by the trier of

fact. Because plaintiff's entitlement to coverage and damages has not yet been decided, nor have damages been assessed, and because she could conceivably receive damages exceeding the amount of the settlement proceeds, the trial court erred in granting summary disposition. We additionally reject Westfield's arguments concerning notice of and consent to the settlements.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff sustained various injuries in a multiple-vehicle accident while riding in a company vehicle insured by Westfield under a commercial automobile policy that included an endorsement providing for UM coverage in the amount of $300,000 for each accident.[1] Plaintiff first filed a tort action against three of the drivers involved in the accident. As a result of facilitation, one of the drivers, who had $300,000 in liability coverage, settled with plaintiff for $290,000, another driver, who had $100,000 in liability coverage, settled with plaintiff for $37,500, and the third driver, who also had $100,000 in liability coverage, settled with plaintiff for $5,000. The sum of the three settlements is $332,500—$32,500 over the UM coverage limit. The UM endorsement defines an "uninsured motor vehicle" as including, in part, an *under*insured motor vehicle and a hit-and-run vehicle for which the driver and owner cannot be identified. With respect to the earlier litigation, it is undisputed that two of the three drivers sued by plaintiff, those with $100,000 in liability coverage on their vehicles, are considered to have been driving underinsured vehicles under the definition of "underinsured vehicle" in the UM endorsement. These

[1] The police report indicated that the accident involved six moving vehicles.

vehicles would therefore qualify as uninsured motor vehicles, falling under the umbrella of the UM endorsement. Two other vehicles involved in the accident that were not the subject of the prior lawsuit constituted, according to plaintiff, hit-and-run vehicles operated and owned by unknown persons, thereby also falling within the scope of the UM endorsement.[2]

Plaintiff thereafter filed this action against Westfield and Allied Property and Casualty Insurance Company to recover UM benefits.[3] We note, however, that the complaint made no claim of negligence or liability with respect to the two underinsured motorists. Therefore, the demand for UM benefits is not predicated on any alleged liability of the underinsured drivers. Rather, the complaint extensively outlined the alleged negligence and liability of the two unidentified hit-and-run drivers, which allegations form the basis of the claims for UM benefits against Westfield and Allied. Additionally, plaintiff's complaint alleged that the negligence of the two unidentified motorists caused her to suffer serious physical injuries, resulting in noneconomic and economic losses. Westfield filed a counterclaim, seeking a declaratory judgment that plaintiff is not entitled to any UM benefits.

Westfield moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff received well over $300,000 in settlement payments; therefore, because she had already recovered more than the policy limit for her injuries, she was no longer entitled to any

[2] Westfield states that these two vehicles may have been "uninsured" and does not concede the point, but it proceeds by assuming that they were uninsured for purposes of summary disposition, given that the evidence must be viewed in a light most favorable to plaintiff.

[3] Allied is plaintiff's own automobile insurance carrier, and the action against Allied remains pending. Plaintiff has received personal protection insurance benefits from Allied.

UM benefits. Westfield's position was that the UM coverage guaranteed an injured insured coverage for losses of up to $300,000 when injured by an uninsured motorist and that this included any payments received from legally responsible parties.[4] According to Westfield, the settlements reduced the $300,000 in available UM coverage, with the benefits acting as a gap filler, although there was no gap here, given that the settlements exceeded $300,000.[5] Westfield additionally contended that plaintiff had settled with the three drivers in the previous litigation without giving Westfield written notice and without obtaining its consent to settle, thereby violating the policy and depriving plaintiff of any coverage.

In response, plaintiff maintained that the policy language allows her to recover UM benefits from Westfield for the difference between the aggregate of the third-party settlements and the total amount of her damages as determined by the jury, should they exceed the settlement proceeds, up to the $300,000 policy limit. In this way, plaintiff could be made whole. Plaintiff contended that the policy merely precludes a double recovery for the same losses and that if a jury were to find damages in excess of the settlement amounts and Westfield were to pay that difference to plaintiff, there would be no duplicate recovery or payment. Plaintiff further argued that the notice and consent provisions cited by Westfield were inapplicable. The trial court accepted Westfield's position and granted the motion for summary disposition under MCR 2.116(C)(10) with-

[4] We shall discuss the specific policy provisions at issue in our analysis.

[5] By way of example, had plaintiff received $200,000 in settlement proceeds, Westfield would be agreeable to paying plaintiff $100,000 in UM benefits, assuming no notice and consent issues concerning the settlements and that plaintiff was legally entitled to recover compensatory damages from the uninsured motorists.

out reaching the issues of notice and consent concerning the three settlements. This Court subsequently granted plaintiff's application for leave to appeal.

II. ANALYSIS

A. STANDARD OF REVIEW AND SUMMARY DISPOSITION PRINCIPLES UNDER MCR 2.116(C)(10)

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). The proper interpretation of a contract, such as an insurance policy, is a question of law and likewise subject to review de novo on appeal. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if the moving party does so, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto*, 451 Mich at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material

fact exists." *Quinto*, 451 Mich at 362. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered when deciding a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

B. PRINCIPLES GOVERNING INSURANCE CONTRACT INTERPRETATION AND UNINSURED MOTORIST BENEFITS

An insurance policy is subject to the same contract interpretation principles applicable to any other species of contract. *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Except when an insurance policy provision violates the law or succumbs to a defense traditionally applicable under general contract law, courts "must construe and apply unambiguous contract provisions as written." *Id.* "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Id.* at 464. A court cannot hold an insurance company liable for a risk that it did not assume. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). When its provisions are capable of conflicting interpretations, an insurance contract is properly considered ambiguous. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999).

The no-fault act, MCL 500.3101 *et seq.*, guarantees personal protection insurance (PIP) benefits to victims of accidents in return for restrictions on a victim's ability to file a tort action, but it does not similarly guarantee residual-liability coverage, such as when a negligent driver is uninsured. *Husted v Auto-Owners Ins Co*, 459 Mich 500, 513; 591 NW2d 642 (1999). "Uninsured motorist coverage is not required by statute but may be purchased to provide the insured with a source of recovery for excess economic loss and noneconomic loss if the tortfeasor is uninsured." *Citizens Ins Co of America v Buck*, 216 Mich App 217, 224-225; 548 NW2d 680 (1996). In enacting the no-fault act, the Legislature divided an injured party's loss into two separate categories: first, loss for which the no-fault provider is liable and, second, loss for which a tortfeasor is liable. *Bradley v Mid-Century Ins Co*, 409 Mich 1, 62; 294 NW2d 141 (1980), overruled in part on other grounds *Wilkie v Auto-Owners Ins Co*, 469 Mich 41 (2003). "No-fault insurance provides security for the first type [of loss]; uninsured motorist coverage, which presupposes that the insured is entitled to recovery under the tort system, provides security for the second type [of loss]—it is offered to protect against being left with a worthless claim against an uninsured motorist." *Bradley*, 409 Mich at 62.[6]

With respect to UM benefits, our Supreme Court in *Rory*, 473 Mich at 465-466, made the following observations:

> Uninsured motorist insurance permits an injured motorist to obtain coverage from his or her own insurance

[6] In *Bradley*, 409 Mich at 62, our Supreme Court noted that the purpose of the no-fault act is to give a contractual right of action against a person's own insurer for wage loss and medical expenses, while a "tort action for non-economic and excess economic loss was preserved in cases of severe loss."

> company to the extent that a third-party claim would be permitted against the uninsured at-fault driver. Uninsured motorist coverage is optional—it is not compulsory coverage mandated by the no-fault act. Accordingly, the rights and limitations of such coverage are purely contractual and are construed without reference to the no-fault act. [Citations omitted.]

C. PROCEDURAL FRAMEWORK OF ACTION

It is appropriate to give some context to our discussion by setting forth the procedural framework generally applicable to litigation involving a claim for UM benefits and multiple tortfeasors.

In an action by an insured against an insurer to recover UM benefits, the litigation necessarily proceeds, to some degree, as a suit within a suit, in which the insured must prove the underlying liability or negligence of the uninsured motorist, causation, and damages, along with establishing the contractual liability of the insurer to pay the benefits under the relevant coverage provisions of the insurance policy. See *Rory*, 473 Mich at 465 (stating that UM benefits are available from an insurer to the extent that a permissible third-party claim against the uninsured at-fault driver exists); see also M Civ JI 36.15 (third-party tort actions, economic and noneconomic losses) and M Civ JI 67.17 (verdict form for economic- and noneconomic-loss claims for automobile negligence with comparative negligence). This concept is reflected in § A(1) of the UM-coverage endorsement in the case at bar, which states:

> We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle." The damages must result from "bodily injury" sustained by the "insured" caused by an "accident." The owner's or driver's liability for these

> damages must result from the ownership, maintenance or use of the "uninsured motor vehicle."

This case presents not only a situation involving a claim for UM benefits, but one in which there are also alleged multiple tortfeasors or persons at fault. MCL 600.2957(1) provides:

> In an action based on tort or another legal theory seeking damages for personal injury, . . . the liability of each person shall be allocated under this section by the trier of fact and, subject to [MCL 600.6304], in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

See also MCR 2.112(K) (addressing notice requirements when raising claims of nonparty fault).

In an action seeking damages for personal injury involving the fault of more than one person, the trier of fact determines the total amount of the plaintiff's damages and the percentage of the total fault of all persons who contributed to the injury. MCL 600.6304(1). In allocating the percentage of fault, the trier of fact must consider the nature of the conduct of each person allegedly at fault and the extent of the causal connection between the damages claimed and the conduct. MCL 600.6304(2). In general, the trial court must set the damages award in the judgment in accordance with the fault allocations rendered by the trier of fact. MCL 600.6304(3). With some exceptions, a defendant's liability for damages is "several only and is not joint." MCL 600.2956. "These statutory provisions, included among the provisions referred to as the 'tort-reform statutes,' are designed to allocate fault and responsibility for damages among multiple tortfeasors."

Kaiser v Allen, 480 Mich 31, 37; 746 NW2d 92 (2008). A tortfeasor need not pay damages in an amount greater than his or her allocated percentage of fault. *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 51; 693 NW2d 149 (2005). Under the fault-allocation statutes, a finding that a plaintiff suffered, for example, $100,000 in damages and that a defendant tortfeasor was 20 percent at fault would result in a judgment against that defendant in the amount of $20,000. See *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 253; 660 NW2d 344 (2003), quoting *Smiley v Corrigan*, 248 Mich App 51, 55; 638 NW2d 151 (2001). The $20,000 represents the apportionment of the loss for which the defendant is responsible.

Any damages award in this case would be subject to reduction to reflect the combined fault of the two unidentified hit-and-run motorists unless 100 percent of the fault is attributed to them.

D. DISCUSSION

Keeping in mind the principles governing appellate review, MCR 2.116(C)(10), insurance contract interpretation, and UM policies, along with the procedural framework, we now address the question concerning the proper treatment and the effect of the $332,500 in settlement proceeds in relation to both the UM coverage afforded under the policy and damages. Westfield maintains that the $300,000 in potential UM benefits must be reduced by the amount of the settlement proceeds, thereby leaving nothing owing under the policy, and plaintiff counters that Westfield must pay any damages in excess of $332,500, such as those the jury conceivably might assess at trial, subject to the $300,000 policy limit. Our analysis in resolving the

dispute requires review and construction of the contractual provisions of the UM endorsement. We shall address the six sections (A through F) found in the UM endorsement in sequential order, devoting the appropriate amount of attention to each section on the basis of its relevance to the issues presented. As part of our discussion, we will also address the secondary issue concerning notice of and consent to settlement with respect to the earlier litigation, which the trial court did not address. Westfield, citing and relying on §§ A(2) and C(1) of the UM endorsement, contends that plaintiff failed to satisfy these notice and consent provisions, excluding her from recovering UM benefits under the policy. Plaintiff asserts that Westfield waived this argument or is estopped from making it because Westfield denied coverage and walked out of court-ordered facilitation. Plaintiff also argues that the sections of the UM endorsement relied on by Westfield are inapplicable.

1. SECTION A OF THE UM ENDORSEMENT

Section A of the UM endorsement addresses coverage. Section A(1), as indicated earlier, merely provides that, on proof of bodily injury caused by an accident and liability arising out of the ownership, maintenance, or use of an uninsured motor vehicle, Westfield will pay benefits for sums that the insured is legally entitled to recover as compensatory damages from the driver or owner of the uninsured motor vehicle. Thus, § A(1) obligates Westfield to pay whatever damages plaintiff would have recovered from the owner or driver of an uninsured motor vehicle.

Section A(2) provides:

> With respect to damages resulting from an "accident" with a vehicle described in Paragraph **b.** of the definition of

"uninsured motor vehicle," we will pay under this coverage only if **a.** or **b.** below applies:

a. The limit [sic] of any applicable liability bonds or policies have been exhausted by payment of judgments or settlements; or

b. A tentative settlement has been made between an "insured" and the insurer of a vehicle described in Paragraph **b.** of the definition of "uninsured motor vehicle" and we:

(1) Have been given prompt written notice of such tentative settlement; and

(2) Advance payment to the "insured" in an amount equal to the tentative settlement within 30 days after receipt of notification.

The "vehicle described in paragraph **b.** of the definition of 'uninsured motor vehicle' " is, under § F(3)(b) of the UM endorsement, an "underinsured motor vehicle."[7] Therefore, § A(2) creates a prerequisite to recovering benefits for damages arising out of an accident with an underinsured motor vehicle. As indicated in the recitation of facts, however, plaintiff's complaint is devoid of any claim for benefits based on damages resulting from the accident as caused by the two underinsured drivers who had $100,000 liability policies. There is no allegation that either of the two underinsured drivers was negligent or liable. Rather, plaintiff's complaint focuses solely on the negligence and liability of the two unidentified hit-and-run drivers, the damages that they caused, and Westfield's failure to com-

[7] Section F(3)(b) provides that an

underinsured motor vehicle is a land motor vehicle . . . for which the sum of all liability bonds or policies at the time of an "accident" provides at least the amounts required by the applicable law where a covered "auto" is principally garaged but that sum is less than the Limit of Insurance of this coverage[.]

pensate plaintiff for those damages.[8] Section A(2) is simply not implicated in this case. We therefore reject Westfield's arguments concerning plaintiff's alleged failure to give notice of settlement that rely on § A(2). Moreover, § A(2) does not suggest that the UM endorsement requires the policy limit to be reduced by the amount of settlement proceeds. Under § A(2), if an underinsured vehicle was at issue, the insured would be precluded from receiving any UM benefits unless the

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[8] The complaint stated that, "[a]s a direct and proximate result of the negligence of the unknown operators of the minivan and black pick-up truck," plaintiff sustained injuries and damages. In the count directed specifically at Westfield, the complaint alleged:

> 30. That pursuant to the terms of the policy of insurance Plaintiff is entitled to uninsured motorist coverage since two of the vehicles causing the accident were driven by unidentified drivers and the vehicle was uninsured.
>
> 31. [Described the alleged negligence of the pick-up truck's driver]
>
> 32. [Described the alleged negligence of the minivan's driver]
>
> 33. That demand was made upon [Westfield] to pay damages caused by the unidentified operators of the minivan and black pick-up truck to Plaintiff pursuant to the provisions of the insurance policy and specifically those provisions protecting her from uninsured motorists.
>
> 34. That more than 30 days have elapsed and [Westfield] has refused, failed and/or otherwise breached its contractual duty to indemnify Plaintiff for her injuries and damages caused by the unidentified operators of the minivan and black pick-up truck.

We reject the argument that § A(2) applies merely because the accident factually involved two vehicles that fall within the definition of "uninsured motor vehicle" where the coverages applicable to them were less than the limits of insurance under the UM coverage. Plaintiff does not seek to recover under the UM coverage for any bodily injury caused by the drivers of the two underinsured vehicles. Because plaintiff does not seek coverage under § A(1) with respect to these drivers, the limitations on that coverage provided in § A(2) are irrelevant.

insured obtained a judgment or settlement in an amount that exhausted applicable underinsured policy limits or if the insured and the insurer of the underinsured vehicle reached a tentative settlement, with Westfield receiving prompt written notice of the settlement and making a timely advance payment to the insured in the amount of the tentative settlement. This language does not indicate that if the insured complied with these requirements, which would give the insured a right to UM benefits, the policy limit of the UM coverage would be reduced by the amount of the underinsured's exhausted policy (§ A[2][a]) or by the amount of Westfield's advance payment relating to a tentative settlement (§ A[2][b]).[9] Indeed, the language of § E(4) stating that advance payments will be separate from coverage amounts indicates the contrary, i.e., that no reduction occurs. See the discussion in part II(D)(5) of this opinion.

2. SECTION B OF THE UM ENDORSEMENT

This section defines who qualifies as an insured under the policy. Because there is no appellate issue regarding § B, and it has no bearing on the issues presented, it is unnecessary for us to construe this section.

3. SECTION C OF THE UM ENDORSEMENT

Section C of the UM endorsement addresses the topic of exclusions, and the only language debated by the parties is in § C(1), which provides:

[9] Section A(3) provides that "[a]ny judgment for damages arising out of a 'suit' brought without our written consent is not binding on us." There was no "judgment for damages," and neither party relies on this provision.

> This insurance does not apply to any of the following:
>
> **1.** Any claim settled without our consent. However, this exclusion does not apply to a settlement made with the insurer of a vehicle described in Paragraph **b.** of the definition of "uninsured motor vehicle" [that being an underinsured vehicle], in accordance with the procedures described in Paragraph **A.2.b.**

This language indicates that UM coverage does not apply to a claim settled without Westfield's consent; however, plaintiff is seeking coverage only with respect to the two unidentified hit-and-run drivers, and there was no previous claim, or settlement, concerning these drivers. Thus, Westfield's argument regarding the need for consent under § C(1) is not viable under the facts of this case, and § C(1) does not support in any form or fashion Westfield's position that the settlement proceeds reduced the amount of available benefits. Westfield is attempting to read § C(1) much more broadly than the meaning expressed in the words of the section. It is evident that § C(1) governs situations in which an insured settles with an uninsured driver without Westfield's consent and thereafter sues Westfield for UM benefits related to the negligence of the settling uninsured driver. That is not the situation here, and Westfield will be free to pursue the unidentified drivers to recoup any damages that might be awarded to plaintiff under the UM coverage.

4. SECTION D OF THE UM ENDORSEMENT (ANTI-DUPLICATION CLAUSE)

Section D of the UM coverage endorsement, which governs the limits of insurance, is the focus of plaintiff's appeal, and it provides in pertinent part:

> **1.** Regardless of the number of covered "autos," "insureds," premiums paid, claims made or vehicles involved

> in the "accident," the most we will pay for all damages resulting from any one "accident" is the Limit Of Insurance for Uninsured Motorists Coverage shown in the Schedule or Declarations.
>
> **2.** No one will be entitled to receive duplicate payments for the same elements of "loss" under this Coverage Form, any Liability Coverage Form, or any Medical Payments Coverage Endorsement attached to this Coverage Part.
>
> We will not make a duplicate payment under this Coverage for any element of "loss" for which payment has been made by or for anyone who is legally responsible.

Section D(1) merely indicates that the most that Westfield would have to pay under the UM endorsement is the policy limit of $300,000, and plaintiff makes no claim that Westfield could be obligated to pay her more than $300,000 in UM benefits.

Section D(2) precludes an insured from receiving, and indicates that Westfield will not make, duplicate payments for the same elements of loss under multiple coverages under the policy or duplicate payments for any element of loss for which a legally responsible party has made a payment to the insured.[10] Although the phrase "element of loss" is not defined anywhere in the policy, the term "loss" is defined in the policy's general definition section as "direct and accidental loss or damage." The word "element" is not defined in the policy, but it is defined in the dictionary as "a component or constituent of a whole or one of the parts into which a whole may be resolved by analysis." *Random House Webster's College Dictionary* (2001).[11] Taking the

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[10] We note that the first paragraph in § D(2) speaks of the "*same* elements of 'loss,' " while the second paragraph refers to "*any* element of 'loss.' " (Emphasis added.) Ultimately, this difference in drafting does not affect our analysis.

[11] If a term in an insurance policy is not defined in the policy itself, this Court gives the word its commonly understood meaning, which can be

policy definition of "loss" together with the dictionary definition of "element," we conclude that "element of loss" refers to a component of damages. In a personal injury case involving a motor vehicle accident, damages can be composed of economic damages covered by PIP benefits (generally known as first-party benefits),[12] excess economic damages not covered by PIP benefits, and noneconomic damages, which would include recovery for such items as past and future pain and suffering, inconvenience, physical impairment or disfigurement, mental anguish, fright and shock, denial of social pleasures and enjoyments, embarrassment, and humiliation. See MCL 500.3107, 500.3108, and 500.3135; *Bradley*, 409 Mich at 62; *Buck*, 216 Mich App at 224-225; M Civ JI 35.01 *et seq.*, 36.01 *et seq.*, 50.01 *et seq.*, and 67.01 *et seq*.[13]

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accomplished by resort to its dictionary definition. *Brown v Farm Bureau Gen Ins Co of Michigan*, 273 Mich App 658, 662; 730 NW2d 518 (2007).

[12] PIP benefits are payable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation," three years of work loss (with a cap on the monthly amount), expenses reasonably incurred in obtaining ordinary and necessary replacement services for a three-year period (with a cap on the daily amount), and survivor loss. MCL 500.3107 and 500.3108.

[13] MCR 2.516(D)(2) provides:

> Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or its predecessor committee must be given in each action in which jury instructions are given if
>
> (a) they are applicable,
>
> (b) they accurately state the applicable law, and
>
> (c) they are requested by a party.

However, the model instructions do "not have the force and effect of a court rule, and MCR 2.516(D) "does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions." MCR 2.516(D)(1) and (4).

The word "duplicate" is also not defined in the policy, but the dictionary definition of the term, when used as an adjective, is "exactly like or corresponding to something else" or "consisting of or existing in two identical or corresponding parts; double." *Random House Webster's College Dictionary* (2001).

With these definitions in mind, the only reasonable construction of § D(2) is that the language prohibits an insured from receiving double payments for the same noneconomic and excess economic losses or damages; double-dipping (being paid twice for the same injury) is barred, preventing overcompensation for losses.[14] Because plaintiff has already received PIP benefits for economic damages, excess economic damages and noneconomic damages are the damages at issue. See *Bradley*, 409 Mich at 62; *Buck*, 216 Mich App at 224-225.[15] Further, the earlier tort action against the three drivers that led to settlement necessarily entailed, at most,

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[14] Although stated in a different context, our Supreme Court has noted: "Because the purpose of compensatory damages is to make an injured party whole for losses actually suffered, the amount of recovery for such damages is thus limited by the amount of the loss." *Rafferty v Markovitz*, 461 Mich 265, 271; 602 NW2d 367 (1999).

[15] M Civ JI 67.17 is the verdict form generally applicable to automobile tort claims for economic and noneconomic damages and indicates that only excess economic damages are recoverable if the tortfeasor was insured and that any economic damages are recoverable if the tortfeasor was uninsured. This is consistent with MCL 500.3135(3), which provides that

> tort liability arising from the ownership, maintenance, or use . . . of a motor vehicle *with respect to which the security required by [MCL 500.3101] was in effect* is abolished except as to:
>
> (c) Damages for allowable expenses, work loss, and survivor's loss . . . in excess of the daily, monthly, and 3-year limitations contained in [the PIP statutes]. [Emphasis added.]

noneconomic and excess economic damages, given the structure and nature of the no-fault act. See MCL 500.3135.

We are unable to discern from the record whether the settlement proceeds were meant to compensate plaintiff for excess economic losses, noneconomic losses, or a combination of the two, let alone place a dollar amount on each form of damages. Assuming liability, the jury would generally make separate determinations of the amount of excess economic damages and noneconomic damages. See M Civ JI 67.17. Because the settlement agreements contained no allocation of loss between excess economic damages and noneconomic damages; because plaintiff does not argue that the element of loss, i.e., component of damages, should be categorized in increments beyond a single component of noneconomic damages/excess economic damages; and because Westfield's benefits-reduction argument also implicitly groups noneconomic damages/excess economic damages as the relevant element of loss, we shall treat the settlement proceeds as a lump-sum element of loss for comparison with a potential jury award, which shall also be treated as a lump sum. Thus, if the jury ultimately awards plaintiff $332,500 or less, regardless of how the jury apportions excess economic damages and noneconomic damages in its verdict, Westfield cannot be held liable for any UM benefits under the policy because that would result in duplicate or double payments for the same element of loss (double-dipping) and overcompensation of the plaintiff's injuries. However, should plaintiff establish liability and the jury return a verdict finding damages in an amount in excess of $332,500, regardless of how the damages are allocated between excess economic damages and noneconomic damages, a judgment ordering Westfield to pay UM benefits for some or all of the excess within the confines of the

policy limit would not offend § D(2) because a duplicate or double recovery would not occur. Westfield would have to pay the difference between the $332,500 in settlement proceeds and the total damages award, up to the policy limit of $300,000 and subject to any fault allocation.[16] Plaintiff would not be receiving double payments for the same element of loss, but would instead be receiving an award making her whole without duplication. Accordingly, merely because plaintiff has received more than $300,000 in settlement proceeds does not mean that a judgment against Westfield would involve duplicate payments. Rather, only if a jury determines that plaintiff is entitled to $332,500 in damages or less can the trial court definitely declare that Westfield is not liable for any amount under the insurance contract because to so hold it liable would result in plaintiff's receiving a duplicate payment for the same element of loss. We find no language in § D(2) that can be construed to support Westfield's position that the

[16] At first glance, our system requiring the allocation of fault, as discussed earlier, could be viewed as complicating matters in this case. By way of example, while still considering the settlement disbursement of $332,500, if a jury were to find that plaintiff suffered $500,000 in damages and attributed 20 percent fault to the unidentified motorists, only a $100,000 judgment could be entered against Westfield. We wish to make abundantly clear that in determining whether a duplicate payment would be made in such a situation, the trial court must consider the overall damage total ($500,000), not the fault-allocated amount ($100,000), and compare it against the $332,500 in settlement proceeds. Even though the $100,000 fault-allocated damages judgment would be less than the settlement proceeds, a judgment ordering Westfield to pay $100,000 would not result in plaintiff's receiving a double recovery for her losses or a windfall, which is what § D(2) prohibits. Plaintiff would not be overcompensated because she would be paid a grand total of $432,500 (settlement proceeds of $332,500 plus $100,000 for the allocated judgment), while suffering a $500,000 loss. Westfield would still retain the benefit of not having to pay the remaining $67,500 in losses because of fault allocation.

$300,000 in available UM benefits must be reduced by the amount of the settlement proceeds.

Westfield appears to suggest that, because plaintiff received settlement proceeds for both excess economic damages and noneconomic damages, she would be paid a second time for those damages if a damages award were assessed against Westfield; therefore, there would be a violation of the anti-duplication language in § D(2). There is, however, a difference between a second payment and a duplicate or double payment, the former not necessarily entailing overcompensation for the same loss and the latter entailing overcompensation and double recovery for the same loss. Westfield's position would also be contrary to its own recognition that if settlement proceeds are less than the policy limit, further payments under the UM policy might be appropriate. Moreover, Westfield's interpretation of § D(2) is inconsistent with numerous cases from other jurisdictions in which courts were confronted with comparable anti-duplication language.[17]

In *Grayer v State Farm Ins Co*, 611 So 2d 762, 764 (La App, 1992), the Louisiana Court of Appeal distinguished anti-duplication clauses from reduction clauses, ruling:

> In our opinion the above policy language[18] is different from the language in [the cases discussing clauses]. In those cases the policies provide that "the amount pay-

[17] We acknowledge that there are some cases that support Westfield's position, e.g., *Imre v Lake States Ins Co*, 803 NE2d 1126 (Ind App, 2004); however, we find the reasoning in those cases unpersuasive.

[18] The policy language in *Grayer*, 611 So 2d at 764, provided that "no one will be entitled to receive duplicate payments under this coverage for the same element of loss which were paid because of the bodily injury or property damage by or on behalf of persons or organizations who may be legally responsible." This language is virtually identical to the language in the UM endorsement at issue here.

> able . . . shall be reduced by an amount equal to total limits of liability" . . . and "any amounts . . . payable . . . shall be reduced by all sums paid. . . ." . . . In each instance the language directs that the *coverage* (i.e. amounts payable) are to be reduced by either the liability coverage available or the amounts actually paid. In the instant case the language prohibits duplicate *payments*. It does not provide for a reduction in coverage, only that the insured will not be paid twice for the same injuries. This is different than reducing the available coverage. For example, if John Jackson's injuries are worth $100,000.00, he should be entitled to receive the full UM coverage available, i.e. $20,000.00, which would give him a total recovery of $28,500.00[, considering the earlier $8,500 payment from Allstate]. However, if his total injuries are $5,000.00, he would not receive any UM payment from State Farm because he has already been full [sic] paid (i.e. the $8,500.00 Allstate paid) for his injuries. That is the purpose of State Farm's policy language, to prevent duplicate payments, not reduce coverage. [Emphasis in original; citations omitted; deletions within quotations in original.]

The Nevada Supreme Court similarly distinguished anti-duplication clauses, comparable to the one in our case, from reduction clauses in insurance policies. *St Paul Fire & Marine Ins Co v Employers Ins Co of Nevada*, 122 Nev 991; 146 P3d 258, 263 (2006) (holding that the anti-duplication clause merely limited the coverage available to an injured party to elements of loss not already covered by a workers' compensation insurer, whereas the reduction clause required reduction in the amount of insurance coverage available for amounts paid in workers' compensation benefits); see also *Greenfield v Cincinnati Ins Co*, 737 NW2d 112, 117-118 (Iowa, 2007).

In *Fischer v Midwest Security Ins Co*, 268 Wis 2d 519, 531-533; 673 NW2d 297 (Wis App, 2003), the Wisconsin Court of Appeals, also addressing a comparable anti-duplication clause, rejected the insurer's argument that

recovery by the plaintiffs pursuant to an underinsured vehicle endorsement would constitute a duplicate payment when the plaintiffs had already recovered the maximum limit under their UM coverage. The court explained:

> A plain reading of [the anti-duplication clause] leads one to expect that a "duplicate payment" would be one where both a tortfeasor and an insurer compensate the insured for the same element of loss. [The provision] guards against profiting beyond the damages actually incurred. [*Id.* at 532.]

We are addressing an anti-duplication clause and not a reduction-in-benefits clause; therefore, we agree with plaintiff that § D(2) only precludes her from a double recovery for the same loss.

5. SECTION E OF THE UM ENDORSEMENT

Section E changes the conditions of the UM coverage. The first paragraph of § E(4) plays a prominent role in, and is the focus of, Westfield's arguments.

Section E(4) addresses the transfer of rights of recovery against others to Westfield. Section E(4) provides, in part, that if Westfield "make[s] any payment and the 'insured' recovers from another party, the 'insured' shall hold the proceeds in trust for [Westfield] and pay [Westfield] back the amount [it has] paid." This language is somewhat more difficult to decipher than the language in § D(2). We conclude, however, that the language in § E(4) has no bearing on the issue presented.

Under § E(4), if Westfield had made an advance payment to plaintiff to the full extent of the policy coverage, $300,000, before plaintiff received any settlement proceeds, once plaintiff received the settlement

payments, the contractual provision would require plaintiff to return the $300,000 advance payment to Westfield, leaving plaintiff with $332,000 in settlement proceeds and leaving Westfield without a penny lost. That is the full import of the language at issue in § E(4). It does not suggest that the policy limit would be permanently exhausted under our hypothetical example and that plaintiff could no longer make a claim for UM benefits should she have actual damages exceeding the amount of the settlement proceeds. While one might, through excessive and implicit extrapolation of the contractual language, reach a contrary conclusion, it would offend the plain language of § E(4) to equate it to a reduction-of-benefits clause. Ultimately, § E(4) plays no role in analyzing this case. Rather, § E(4) is simply a mechanism by which Westfield can recoup advance payments, which would never total more than the $300,000 policy limit, if the insured has received any amount up to $300,000 from third parties. It does not answer the question of what occurs in a situation in which the insured suffers damages beyond the proceeds received from legally responsible parties; rather, § D(2) answers that question. The language in § E(4) cannot reasonably be interpreted as requiring a dollar-for-dollar reduction in the policy limit and available benefits equivalent to the settlement proceeds received by plaintiff when damages are greater in amount than the settlement proceeds.

Moreover, "[c]ourts should attempt to harmonize all parts of a contract of insurance so as to give effect to each clause contained therein." *Murphy v Seed-Roberts Agency, Inc*, 79 Mich App 1, 8; 261 NW2d 198 (1977), citing *Jackson v British America Assurance Co*, 106 Mich 47; 63 NW 899 (1895). In *Associated Truck Lines, Inc v Baer*, 346 Mich 106, 110; 77 NW2d 384 (1956), our

Supreme Court, quoting *Laevin v St Vincent de Paul Society of Grand Rapids*, 323 Mich 607, 609-610; 36 NW2d 163 (1949), stated:

> " ' "It is a cardinal principle of construction that a contract is to be construed as a whole; that all its parts are to be harmonized so far as reasonably possible; that every word in it is to be given effect, if possible; and that no part is to be taken as eliminated or stricken by some other part unless such a result is fairly inescapable." ' "

Furthermore, in *Wilkie*, 469 Mich at 50, the Michigan Supreme Court, construing an insurance policy, concluded that any perceived ambiguity in a certain paragraph of the policy was eliminated by the language in later paragraphs, which must all be read together.

To interpret § E(4) as standing for the proposition argued by Westfield, that the policy benefits must be reduced by the amount of the settlement proceeds, would run afoul of these contract construction principles. When § E(4) is read in conjunction and harmony with § D(2), it becomes abundantly clear that § E(4) is, in essence, precluding a double recovery for the same injury, just like § D(2), by making an insured return up to $300,000 in advance payments to Westfield when the insured subsequently recovers that amount from another party. As indicated above, § D(2) does not allow an insured to receive duplicate payments for the same element of loss, but if § E(4) is construed as suggested by Westfield, the anti-duplication principle of § D(2) is rendered meaningless. Section D(2) necessarily stands for the proposition that an insured *is entitled* to UM benefits unless an award of benefits would result in a double recovery for the same loss. If § E(4) is read to mean that any payment by a legally responsible party to the insured is setoff against or reduces the $300,000 in coverage, it would directly conflict with § D(2) because

such an interpretation would indicate that an insured *may not be entitled* to UM benefits even if a double recovery failed to occur.[19] As argued by plaintiff, it is § D, not § E, that governs the limit of the UM benefits.

Our interpretation still gives meaning to § E(4) and results in that section complementing § D(2). Section D(2) prevents an insured from receiving a double recovery from Westfield on a loss for which compensation was already received from a legally responsible party. And § E(4) demands that the insured return any payments advanced by Westfield under the UM endorsement should the insured recover a payment covering the loss for which Westfield had made the advanced payment, subject to a subsequent claim for UM benefits should damages exceed the settlement proceeds.

We also call attention to additional language in § E(4) concerning damage caused by an accident with an underinsured vehicle, which provides:

> If we advance payment to the "insured" in an amount equal to the tentative settlement within 30 days after receipt of notification:
>
> **a.** *That payment will be separate from any amount the "insured" is entitled to recover under the provisions of Uninsured Motorists Coverage;* and
>
> **b.** We also have a right to recover the advance payment. [Emphasis added.]

This language indicates that if an insured reached a tentative settlement with an underinsured driver for

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[19] By way of another example, if an insured suffered $500,000 in damages, with a UM policy limit of $300,000, received settlement proceeds amounting to $300,000, and there was no issue of fault allocation, § D would dictate that the insured could recover $200,000 in UM benefits, but under Westfield's interpretation, § E(4) would dictate that no UM benefits are recoverable. Under Westfield's construction, § D serves no purpose, as it would be swallowed up by § E(4).

$50,000 and gave the appropriate notice to Westfield, and if Westfield then made an advance payment of $50,000 to the insured, Westfield would be entitled to repayment of the $50,000 when the settlement was paid to the insured, but the insured would still be able to recover the full and separately treated $300,000 under the UM coverage, assuming liability and a sufficient amount of damages, because, in essence, Westfield, rather than the insured, received the $50,000 from the third party. In the end, the insured would have recovered $350,000 ($300,000 under the UM coverage, $50,000 settlement proceeds, $50,000 advanced payment from Westfield, less $50,000 repaid to Westfield). Thus, the $50,000 is not an offset that reduces the $300,000 in UM coverage, but represents compensation in addition to the $300,000 in UM benefits. This is consistent with our interpretation of the first paragraph in § E(4) and conflicts with the underlying theme of Westfield's argument.

6. SECTION F OF THE UM ENDORSEMENT

Section F governs the definition of terms used in the UM endorsement that we referred to earlier in this opinion. There is no need to further explore this section.

7. MICHIGAN CASES AND REDUCTION CLAUSES

Contrary to Westfield's argument, the insurance policy does not call for a reduction in benefits payable under the UM endorsement in an amount equal to any payments made by legally responsible parties. The Michigan cases holding that a benefit reduction occurs when payments are made by legally responsible parties are easily distinguished, given the clear reduction language in the policies.

In *Schroeder v Farmers Ins Exch*, 165 Mich App 506, 508; 419 NW2d 9 (1987), the insurance policy provided: "The amount of bodily injury coverage provided under the Uninsured Motorists Coverage of this policy shall be reduced by the amount of any other bodily injury coverage available to any party held to be liable for the occurrence."

In *Parker v Nationwide Mut Ins Co*, 188 Mich App 354; 470 NW2d 416 (1991), the plaintiff's decedent died in a car crash, and the plaintiff filed suit against and settled with the operator of the vehicle that struck the decedent and the dramshop that served the driver in the amounts of $20,000 and $160,000, respectively. The decedent also had a no-fault policy with the defendant insurer that included endorsements providing UM and underinsured motorist coverage equaling $100,000, and the plaintiff filed suit against the insurer after the settlements were entered. This Court affirmed the trial court's order granting summary disposition in favor of the insurer on the basis of a setoff provision, which provided that the

> limits of this coverage and/or any amounts payable under this coverage will be reduced by:
>
> a. any amount paid by or for any liable parties. [*Id.* at 355.]

This Court concluded:

> Because the total amount received by plaintiff from both the driver and the dramshop exceeded the policy coverage, the trial court did not err in finding that defendant was entitled to summary disposition pursuant to the setoff provision of the underinsured motorist endorsement. [*Id.* at 357.]

Here we do not have a comparable setoff or reduction provision, and the policy militates against any finding that a benefit setoff or reduction is proper.

In *Erickson v Citizens Ins Co*, 217 Mich App 52; 550 NW2d 606 (1996), and *Mead v Aetna Cas & Surety Co*, 202 Mich App 553; 509 NW2d 789 (1993), this Court addressed the question whether proceeds received by the insured from third parties should be offset against the total amount of damages or against the amount of the UM coverage. Both panels held that such proceeds should be offset against the coverage limit and not the total amount of damages pursuant to the clear and unambiguous language of the insurance policies. *Erickson*, 217 Mich App at 55,[20] *Mead*, 202 Mich App at 555-556. The insurance policy language at issue in *Erickson* provided:

> Any amounts otherwise payable for damages under this coverage shall be reduced by all sums:
>
> 1. Paid because of the "bodily injury" by or on behalf of persons or organizations who may be legally responsible. [*Erickson*, 217 Mich App at 54.]

The language at issue in *Mead* was essentially identical to that in *Erickson*. *Mead,* 202 Mich App at 555.

Again, we do not have comparable reduction or setoff language here. Section E(4) and the anti-duplication language found in § D(2), which precludes a double recovery for the same element of loss, as well as the contract in general, do not state in any form or fashion that the amount payable under the coverage must be reduced by sums paid because of bodily injury by legally responsible parties. If this is what Westfield intended, expressing this intent in the policy was not accomplished.

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[20] The *Erickson* panel did not allow a complete offset against the policy limit, concluding that some of the proceeds provided to the plaintiff were not made "by or on behalf of persons or organizations who may be held legally responsible." *Erickson*, 217 Mich App at 55 (emphasis omitted).

In sum, we hold that Westfield's liability and obligations under the UM coverage depend on the extent of any damages found by the jury, if indeed the jury rules in plaintiff's favor. Accordingly, the trial court erred in granting summary disposition in favor of Westfield.

III. CONCLUSION

We hold that there is no language in the policy supporting the trial court's benefits-reduction ruling and that the language in the UM endorsement dictates that any offset pertains only to duplicate payments for the same noneconomic and excess economic losses. Westfield would be liable for UM benefits equivalent to the difference by which any overall damages award exceeds the sum of the settlement proceeds, subject to the policy limit and any allocation of fault determined by the trier of fact. Because plaintiff's entitlement to coverage and damages has not yet been decided, nor damages assessed, and because she could conceivably receive damages exceeding the amount of the settlement proceeds, the trial court erred in granting summary disposition. Finally, Westfield's notice and consent arguments fail because the sections of the UM endorsement cited are inapplicable under the facts of the case.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

PEOPLE v SHAKUR

Docket No. 283360. Submitted August 12, 2008, at Detroit. Decided August 14, 2008, at 9:00 a.m.

Nursing-home nurse's aides Tahirah H. Shakur, Keisa Y. Cooper, and Ericka N. Jackson were charged in the 41-A District Court with the misdemeanor offense of physically, mentally, or emotionally abusing, mistreating, or harmfully neglecting a patient, MCL 333.21771(1). While preparing the body of a deceased nursing-home patient for transport to a funeral home, the defendants posed and took pictures of the decedent's body. The court, Kimberley A. Wiegand, J., denied the defendants' motions to dismiss the charges, rejecting their assertion that a dead nursing-home patient cannot be abused, mistreated, or neglected. The Macomb Circuit Court, Mark S. Switalski, J., affirmed on appeal. Jackson and Cooper appealed by delayed leave granted.

The Court of Appeals *held*:

MCL 333.21715(2) provides, in part, that "[n]ursing care and medical care shall consist of services given to individuals who are subject to prolonged suffering from illness or injury or who are recovering from illness or injury." Under the clear language of § 21715(2), the care and services that a patient receives in a nursing-home setting are necessarily those provided to a live individual. Because the decedent was not receiving such "care and services" at the time relevant to this case, the decedent was not a "patient" for purposes of MCL 333.21771(1). Accordingly, the conduct of the defendants, although reprehensible and disrespectful, did not constitute a violation of § 21771(1).

Reversed and remanded for further proceedings.

HEALTH — NURSING HOMES — ABUSE, MISTREATMENT, OR NEGLECT OF PATIENTS.

The statute that makes it a misdemeanor for a licensed nursing home or its personnel to physically, mentally, or emotionally abuse, mistreat, or harmfully neglect a patient does not apply to actions taken with respect to the body of a deceased nursing-home patient (MCL 333.21771[1]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Richard M. C. Adams*, Assistant Attorney General, for the people.

Joseph Toia for Keisa Y. Cooper.

Blanco Wilczynski, P.C. (by *Derek S. Wilczynski*), for Ericka N. Jackson.

Before: MURRAY, P.J., and WHITBECK and TALBOT, JJ.

TALBOT, J. Defendants, Ericka Nichole Jackson and Keisa Yvette Cooper, appeal by delayed leave granted.[1] Defendants were charged in the district court with violating MCL 333.21771(1), which is a misdemeanor pursuant to MCL 333.21799c(1)(e). The district court denied defendants' motion to quash[2] the complaints and dismiss the charges against them. Defendants appealed to the circuit court, which affirmed the district court's ruling. We reverse and remand.

I. FACTUAL HISTORY

Defendants worked as nurse's aides at Cherrywood Nursing and Living Center. On October 13, 2004, a resident of the nursing home, Lillian McIntyre, passed away. Although other nurse's aides had been assigned to clean and prepare McIntyre's body for transport to a funeral home, defendants entered the room and took over the task. Defendants posed McIntyre's body by raising her hands in the air, putting her arms behind

[1] Although defendant Tahirah Haseena Shakur was involved in the circuit-court appeal, she does not participate in the appeal before this Court.

[2] We use the terminology "to quash" because it was employed by the parties in the lower courts, but construe defendants' respective motions to be more properly considered as motions to dismiss.

her head, and bending her knees. They also patted McIntyre's hand and told her to "wake up." Defendant Tahirah H. Shakur, using the camera on her cellular phone, took a picture of defendants Keisha Y. Cooper and Ericka N. Jackson hugging McIntyre's dead body.

Defendants were suspended from employment pending an investigation and were subsequently fired. The Department of Community Health (DCH), Health Investigation Division, launched an investigation and determined that there was insufficient evidence that defendants had violated the Public Health Code (PHC) and, therefore, did not revoke their nurse's aides licenses. However, the DCH Bureau of Health Systems cited the nursing home for "a violation of patient dignity."

II. LOWER COURT ARGUMENTS AND RULINGS

Although the DCH ended its investigation against defendants, the Attorney General subsequently charged defendants with physically mistreating a patient in violation of MCL 333.21771(1)[3] of the nursing-homes section of the PHC. Defendants denied the veracity of the allegations and filed motions in the district court to quash the criminal complaints and dismiss the charges against them, asserting, under the plain language of the statute, that McIntyre ceased being a patient when she died. Defendants contended that a deceased person cannot feel and, therefore, cannot be mentally or emotionally abused, mistreated, or harmfully neglected. Moreover, defendants argued that the alleged conduct, i.e., taking pictures of people hugging the deceased, did not amount to abuse or mistreatment.

[3] The statutory subsection provides, in relevant part: "A[n] . . . employee of a nursing home shall not physically, mentally, or emotionally abuse, mistreat, or harmfully neglect a patient." MCL 333.21771(1).

The district court denied defendants' motions and noted that MCL 333.21703(1) defines a "patient" as a "person who receives care or services at a nursing home." "Person," in turn, is defined as an "individual, partnership, association, private corporation, personal representative, receiver, trustee, assignee, or other legal entity" under MCL 333.1106(2). The district court then reviewed dictionary definitions and determined that a "patient" is "an object that is capable of receiving treatment." The court noted that the definition did not require the object to be living. The court further reasoned that, if an object is capable of receiving treatment, it is also capable of being mistreated. More specifically, a dead body is capable of receiving treatment such as involving preparation for burial. The district court ruled that the Legislature could have limited MCL 333.21771(1) to living persons had it so intended and the court declined to read such limiting language into the statute. The court further noted that it was the jury's job to determine whether defendants' specific conduct rose to the level of abuse or mistreatment. Thereafter, all three defendants filed applications for leave to appeal to the Macomb Circuit Court, which were granted, and the cases were consolidated.

In the circuit court, defendants argued that MCL 333.21771(1) was inapplicable to their alleged conduct because the victim must be a "patient" and, therefore, must be living. Defendants incorrectly asserted that the term "patient" is not defined under the statute and resorted to dictionary definitions of the term to plead their case. Defendants relied on the definition of "patient" in Black's Law Dictionary (4th ed) as "one who has been committed to the asylum and has remained there for care and treatment," and *Merriam-Webster Dictionary*'s definition as "a person under medical care." Defendants also relied on dictionary definitions

of "mistreat" as "to treat badly; abuse" and "neglect" as "disregard; to leave undone or unattended, especially through carelessness; omit; ignore; overlook; forget." Defendants then argued that the plain language of the statute evinces the Legislature's intent to protect only living nursing-home residents because it does not specifically mention deceased residents. Further, the statute speaks of physical, mental, or emotional harm, which defendants asserted could only be inflicted on a living person. On the basis of this language, defendants argued that the body of a recently deceased person cannot be a "patient" and, therefore, is not protected by the statute. Defendants also relied on *People v Hutner*, 209 Mich App 280; 530 NW2d 174 (1995), in which this Court found that a dead body could not consent, or deny consent, to sexual acts to support their assertion that a person must be alive to suffer the physical and emotional effects of mistreatment in order to be covered by the statute.[4]

In response, the prosecutor noted that McIntyre clearly received care or services from Cherrywood while she was alive. The question remained whether MCL 333.21771(1) required a "person" to be living to continue to receive the protections of the statute. Specifically, the prosecutor noted that, contrary to defendants' reliance on *Hutner,* "mistreatment" does not require an injury or suffering by the victim. Accordingly, the victim need not be alive like the victim of criminal sexual conduct (CSC), who must deny consent to a sexual act. Therefore, a dead body should be considered a patient pursuant to MCL 333.21771(1).

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[4] Specifically, this Court ruled, "A dead body is not a person . . . . A dead body has no will to overcome. It does not have the same potential to suffer physically or mentally as a live or even an unconscious or dying victim." *Hutner, supra* at 284.

The circuit court affirmed the district court's order denying defendants' motions to quash the complaints and dismiss the charges. The circuit court reviewed the statutory definitions and further noted that the PHC defines "individual" as "a natural person." MCL 333.1105(1). Although the Legislature failed to define "natural person" and, therefore, did not specifically indicate whether he or she could be deceased, the circuit court noted that the Legislature did differentiate between living and dead persons in numerous statutes in the PHC. Accordingly, the court determined that the Legislature must have purposefully omitted such language in MCL 333.21771(1). The circuit court then noted that McIntyre continued to be a "patient" under the definition of MCL 333.21703(1) because she was still receiving treatment when her body was being prepared for transfer to a funeral home.

The circuit court also rejected defendants' reliance on *Hutner*, *supra*, for the proposition that a deceased person cannot suffer physically, mentally, or emotionally and, therefore, is not protected under MCL 333.21771(1). The court first noted that *Hutner* involved a charge of third-degree CSC. An element of that offense is a nonconsensual sexual act, which requires a living person to either consent or deny consent. The circuit court parsed out the phrases in MCL 333.21771(1) and determined that the qualifying phrase "physically, mentally or emotionally" applies only to "abuse." Similarly, the phrase "harmfully" applies only to "neglect." Accordingly, the circuit court determined that the prosecutor needed only to demonstrate that defendants "mistreated" McIntyre to pursue the current charges. The court then found, "While a person would arguably have to be alive to suffer physical, mental or emotional abuse, a person need not be alive to

suffer mistreatment" and that an inanimate object might be "treated badly."

III. STANDARD OF REVIEW

We review questions of statutory interpretation de novo. *People v Buehler,* 477 Mich 18, 23; 727 NW2d 127 (2007).

IV. ANALYSIS

The sole issue on appeal involves the interpretation of MCL 333.21771(1) of the PHC. Specifically, the dispute centers on whether a deceased person can be considered a "patient" subject to mistreatment, abuse, or neglect. As previously discussed by this Court:

> The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. Statutory language should be construed reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. However, if reasonable minds can differ regarding the meaning of the statute, judicial construction is appropriate. [*USAA Ins Co v Houston Gen Ins Co,* 220 Mich App 386, 389-390; 559 NW2d 98 (1996) (citations omitted).]

In addition:

> Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. "Statutes relate to the same subject if they relate to the same person or thing or the same class of persons or things." The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. If statutes lend

> themselves to a construction that avoids conflict, that construction should control. [*Walters v Leech,* 279 Mich App 707, 709-710; ___ NW2d ___ (2008) (citations omitted).]

When interpreting a statute, we rely on its plain language and are precluded from "read[ing] into a statute language that was not placed there by the Legislature." *Risk v Lincoln Charter Twp Bd of Trustees*, 279 Mich App 389, 399; ___ NW2d ___ (2008).

Defendants were charged with violating MCL 333.21771(1), which provides, in part: "A licensee, nursing home administrator, or employee of a nursing home shall not physically, mentally, or emotionally abuse, mistreat, or harmfully neglect a patient." The subsequent debate and rulings from the lower courts focused on whether a deceased individual qualified as a "patient" for invocation of the statute. MCL 333.21703(1) defines "patient" as "a person who receives care or services at a nursing home." MCL 333.1106(2) defines a "person" as "an individual, partnership, cooperative, association, private corporation, personal representative, receiver, trustee, assignee, or other legal entity." An "individual" is further defined by MCL 333.1105(1) as a "natural person." Unfortunately, the Legislature failed to define the term "natural person" within the PHC. This omission led the lower courts and parties to pursue a definition of the term "natural person," through use of a variety of dictionaries, to determine whether the term encompasses both living and deceased individuals. We note that these efforts were not particularly fruitful as the various definitions cited by the respective parties and the courts were circular in nature and provided no meaningful insight into the intent or meaning of the statutory language.

Instead, we look solely to the provisions of the statute to determine the meaning of these ordinary terms and whether they were intended to apply to the specific factual circumstances presented in this case. As noted, a "patient" is defined as "a person who receives care or services at a nursing home." MCL 333.21703(1). What a nursing home is mandated to provide with regard to "care and services" is delineated in MCL 333.21715, which states, in relevant part:

> (1) A nursing home shall provide:
>
> (a) A program of planned and continuing nursing care under the charge of a registered nurse in a skilled facility and a licensed practical nurse with a registered nurse consultant in an intermediate care facility.
>
> (b) A program of planned and continuing medical care under the charge of physicians.
>
> (2) Nursing care and medical care shall consist of services given to individuals who are subject to prolonged suffering from illness or injury or who are recovering from illness or injury. The services shall be within the ability of the home to provide and shall include the functions of medical care such as diagnosis and treatment of an illness; nursing care via assessment, planning, and implementation; evaluation of a patient's health care needs; and the carrying out of required treatment prescribed by a physician.

Given the clear and unambiguous language of MCL 333.21715(2), the care and services that a patient receives in a nursing-home setting are necessarily those provided to a live individual for medical treatment, care, and diagnosis. Because the deceased was not receiving statutorily defined "care and services" at the time relevant to this case, she cannot be construed as a "patient" for purposes of MCL 333.21771(1). Consequently, while we condemn the behavior of defendants and find their actions reprehensible and disrespectful to

the deceased, they do not comprise a violation of the statute. This interpretation is further supported by a separate provision of the PHC that defines a "dead body" as "a human body or fetus, or part of a dead human body or fetus, in a condition from which it may reasonably be concluded that death has occurred." MCL 333.2803(1). Notably, the PHC does not use the term "patient," "person," "individual," or "natural person" to define what constitutes a "dead body." This is consistent with our interpretation of the statutory language as demonstrating the Legislature's intent to protect living patients or residents of nursing homes and provide a mechanism for addressing instances of abuse, mistreatment, and neglect when they occur.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

SHAWL v SPENCE BROTHERS, INC

Docket No. 275271. Submitted May 7, 2008, at Lansing. Decided August 19, 2008, at 9:00 a.m. Leave to appeal sought.

James R. and Mary B. Shawl brought an action against Spence Brothers, Inc., and J. Ranck Electric, Inc., seeking damages for injuries James Shawl suffered when an electrical panel under the control of J. Ranck Electric fell on his back while he was working for a subcontractor of Spence Brothers. Spence Brothers forwarded the Shawls' complaint to its insurer, Amerisure, but Amerisure failed to timely answer the complaint, despite having been granted a 30-day extension by the Shawls' attorney. As a result, the court, William A. Crane, J., entered a default against Spence Brothers. Spence Brothers moved to set aside the default on the ground that the extension to which the parties had agreed changed the deadline to August 14, 2006, rather than August 8, 2006; however, because no answer had been filed by August 14, the trial court denied the motion, and also denied a motion for reconsideration. Spence Brothers appealed.

The Court of Appeals *held*:

1. The trial court's decision on the motion to set aside the default is reviewed for an abuse of discretion, not de novo, because, although the court initially referred to a good-faith standard rather than the standard requiring good cause and a meritorious defense that is set forth in the court rule, the court ultimately applied the correct standard. Accordingly, there are no issues of law regarding the application of the rule presented in this case.

2. The negligence of an insurer or its intermediaries should not be presumptively imputed to an insured, procedurally nonnegligent defendant to preclude a finding of good cause and excusable neglect in connection with a motion to set aside a default. A defendant who diligently turns over a case to an ultimately negligent insurer should not be denied his or her day in court, and should not be obligated to inquire whether the insurer did what it had contracted and accepted a premium to do. Accordingly, Amerisure's negligence in failing to answer the complaint should not be imputed to Spence Brothers, and it constitutes a reasonable excuse, under the good-cause test, to set aside the default.

3. A general contractor is only liable for a subcontractor's negligence in situations where the general contractor failed to take reasonable steps within its supervisory and coordinating authority to protect workers from readily observable, avoidable dangers in common work areas that create a high degree of risk to a significant number of workers. Accordingly, Spence Brothers established the existence of a meritorious defense by asserting that any danger created by the allegedly faulty electrical panel was not readily observable and affected only a small number of workers.

4. Because Spence Brothers has satisfied the requirements of showing good cause and a meritorious defense, permitting the default to stand, by following a rule that would perfunctorily impute Amerisure's negligence to Spence Brothers, would result in manifest injustice.

5. In determining whether a party has established good cause to justify setting aside a default judgment, the trial court should consider the totality of the circumstances, including the following factors: (1) whether the party completely failed to respond or simply missed the deadline to file; (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred; (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment; (4) whether there was defective process or notice; (5) the circumstances behind the failure to file or file timely; (6) whether the failure was knowing or intentional; (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4); (8) whether the default judgment results in an ongoing liability (as with paternity or child support); and (9) if an insurer is involved, whether internal policies of the company were followed. This list is not exhaustive or exclusive, and the trial court has the discretion to determine which factors to consider and how to weigh them.

6. In determining whether a defendant has a meritorious defense, the trial court should consider whether the affidavit contains evidence that (1) the plaintiff cannot prove, or defendant can disprove, an element of the claim or a statutory requirement; (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7), or (8); or (3) the plaintiff's claim rests on evidence that is inadmissible. This list is not exhaustive or exclusive, and the trial court has the discretion to determine which factors to consider and how to weigh them.

Reversed and remanded.

O'CONNELL, J., concurring, wrote separately to advocate that, in order to reduce the element of gamesmanship in the legal process, courts consider the totality of the circumstances when deciding

whether to grant a motion to set aside a default judgment, and to emphasize that the court rules are not a "procedural tightrope" on which a litigant must perfectly balance to avoid being thrown out of court.

1. JUDGMENTS — DEFAULT JUDGMENTS — MOTION TO SET ASIDE — INSURER'S NEGLIGENCE.

The negligence of an insurer or its intermediaries should not be presumptively imputed to an insured, procedurally nonnegligent defendant to preclude a finding of good cause and excusable neglect in connection with a motion to set aside a default judgment (MCR 2.603[D][1]).

2. JUDGMENTS — DEFAULT JUDGMENTS — MOTION TO SET ASIDE — GOOD CAUSE.

In determining whether a party has established good cause to justify setting aside a default judgment, the trial court should consider the totality of the circumstances, which may include the following factors: whether the party completely failed to respond or simply missed the deadline to file; if the party simply missed the deadline to file, how long after the deadline the filing occurred; the duration between entry of the default judgment and the filing of the motion to set aside the judgment; whether there was defective process or notice; the circumstances behind the failure to file or file timely; whether the failure was knowing or intentional; the size of the judgment and the amount of costs due under MCR 2.603(D)(4); whether the default judgment results in an ongoing liability; and, if an insurer is involved, whether internal policies of the company were followed (MCR 2.603[D][1]).

3. JUDGMENTS — DEFAULT JUDGMENTS — MOTION TO SET ASIDE — MERITORIOUS DEFENSE.

In determining whether a defendant has a meritorious defense in connection with a motion to set aside a default judgment, the trial court should consider whether the affidavit contains evidence that the plaintiff cannot prove, or defendant can disprove, an element of the claim or a statutory requirement; a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7), or (8); or the plaintiff's claim rests on evidence that is inadmissible (MCR 2.603[D][1]).

Hurlburt, Tsiros & Allweil, PC (by *Lawrence A. Hurlburt*), for the plaintiffs.

Cardelli, Lanfear & Buikema, PC (by *Anthony F. Caffrey, III*), for the defendant.

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM. Defendant Spence Brothers, Inc., appeals by leave granted the trial court's order denying its motion to set aside a default in favor of plaintiffs James Shawl (Shawl) and Mary Shawl. On appeal, Spence Brothers argues that the trial court erred as a matter of law by applying the wrong standard in denying its motion to set aside the default. In addition, Spence Brothers argues that the trial court abused its discretion in refusing to set aside the default. We reverse and remand.

I. BASIC FACTS AND PROCEDURAL HISTORY

Boice Bird and Sons, Inc., employed Shawl as a journeyman painter. Spence Brothers hired Boice as a subcontractor to perform painting work on the Saginaw County Event Center, and in late June 2003, Boice assigned Shawl to work at the Event Center. While painting the lobby area of the Event Center, Shawl was injured. Specifically, according to Shawl, while he was painting a wall in the lobby, a temporary electrical panel fell toward him and struck him in the back. As a result, according to Shawl, three screws projecting from the rear of the panel punctured his "lumbar spine."

After the accident, Shawl sued Spence Brothers and J. Ranck Electric, Inc. Shawl's suit alleged that Ranck Electric was negligent by failing to brace safely or attach the electrical panel to the wall and that Spence Brothers, as the general contractor, was negligent for failing to ensure that reasonable steps were taken to guard against the danger that Ranck Electric created.

After being served with Shawl's complaint, Spence Brothers forwarded the complaint to its insurer, Amerisure. Amerisure began processing the complaint, but

while examining coverage issues as part of the process, Amerisure determined that it needed more time to answer the complaint. Accordingly, in early July 2006, Annette Rigdins, an Amerisure senior claims representative, contacted Shawl's attorney and asked for a 30-day extension. Shawl's attorney agreed to the extension and asked Rigdins to "put it in writing." Rigdins then wrote a letter to Shawl's attorney that stated that the new due date for answering the complaint was August 8, 2006.

Spence Brothers failed to answer Shawl's complaint by August 8, 2006. As a result, the trial court entered a default against Spence Brothers on August 16, 2006, pursuant to MCR 2.603(A)(1).

Spence Brothers moved to set aside the default under MCR 2.603(D)(1). Spence Brothers argued that the 30-day extension was from the original due date of the answer, July 14, 2006, which, according to Spence Brothers, would have allowed it to answer through the end of the day on August 14, 2006. However, no answer was filed on that date either. Therefore, the trial court denied the motion. Spence Brothers moved for reconsideration, but the trial court also denied that motion. Spence Brothers now appeals.

II. "GOOD FAITH" VERSUS "GOOD CAUSE"

A. STANDARD OF REVIEW

Spence Brothers argues that the trial court did not apply the MCR 2.603(D)(1) criteria when it considered whether to set aside the default. More specifically, Spence Brothers argues that the trial court erroneously refused to analyze the matter to determine whether there was good cause and a meritorious defense as MCR 2.603(D)(1) requires.

With respect to our review of this argument, Spence Brothers relies on *Colista v Thomas*[1] to support its assertion that we should apply a de novo standard of review to determine whether the trial court used the appropriate standard under MCR 2.603(D)(1). In *Colista*, this Court stated that the "interpretation and application of the court rules, like the interpretation of statutes, is a question of law that is reviewed de novo on appeal."[2] However, because the trial court here ultimately explained its use of MCR 2.603(D)(1) and, thus, applied the proper standard, the interpretation and application of the rule are not truly at issue in this case. Therefore, the proper standard of review is the abuse of discretion standard, which applies to review of a trial court's decision on a motion to set aside a default.[3] We also review a trial court's decision to deny a motion for reconsideration for an abuse of discretion.[4]

B. THE WORDING OF THE COURT RULE

MCR 2.603(D)(1), which governs motions to set aside a default, provides: "A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted *only if good cause* is shown *and* an affidavit of facts showing a *meritorious defense* is filed." (Emphasis added.)

C. THE TRIAL COURT'S DECISION

Spence Brothers argues that the trial court applied the wrong legal standard under MCR 2.603(D)(1) be-

[1] *Colista v Thomas*, 241 Mich App 529; 616 NW2d 249 (2000).

[2] *Id*. at 535.

[3] *Koy v Koy*, 274 Mich App 653, 657; 735 NW2d 655 (2007).

[4] *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

cause the trial court never spoke explicitly about "good cause" or a "meritorious defense" at the original hearing on the motion to set aside the default. However, the trial court later provided a fuller explanation in considering Spence Brothers' motion to reconsider the motion to set aside the default.

In response to Spence Brothers' concern that the wrong standard was used, the trial court stated:

> Going back to [MCR] 2.603(D)(1), I was not very artful in saying that I thought that because of this exchange of letters there was not good cause shown. That's what I meant to—I think that's the proper standard and not whether they acted in good faith.

In addition, the trial court stated:

> [I]t's important to the rights of your clients that they have a full hearing, and certainly my words were not as required by the court rules and they were entitled to get a little more definitive response I think as to why I ruled to deny the motion.

The trial court then went on to deny Spence Brothers' motion to reconsider and stated:

> I'll deny the motion for reconsideration under MCR 2.603(D)(1) on the basis that the good cause has not been shown. That's primarily why I think this case is—is easy, and I think plaintiffs' authorities correctly cite that the public policy of the state is in favor of not setting aside defaults indeed without not only good cause but a meritorious defense.

In this regard, the trial court essentially sought to remedy any ambiguity in its prior ruling to deny the motion to set aside the default. In addition, the trial court explained that the reference to "good faith" from the original hearing was merely to say that Shawl did not act in bad faith. In this regard, the trial court stated:

> In this case, quite the contrary. [Shawl] requested the letter [from the insurance adjuster] to foreclose any possibility of confusion or mistake [in regard to the 30-day extension].

Thus, the trial court was simply stating that Shawl acted in good faith and that Spence Brothers did not show good cause to set aside the default.

Even though the trial court may have originally referred to a good faith standard, ultimately the trial court used the correct standard under MCR 2.603(D)(1). Accordingly, Spence Brothers has not shown an abuse of discretion with regard to this issue because the trial court, in fact, used the proper standard.

III. APPLYING MCR 2.603(D)(1)

A. STANDARD OF REVIEW

Spence Brothers argues that it demonstrated good cause based on procedural irregularities and genuine confusion in the proceedings below. Spence Brothers further argues that it has a meritorious defense that will extinguish liability and that a lesser showing of good cause will suffice where a meritorious defense is strong.

As noted, we review a trial court's decision on a motion to set aside a default for an abuse of discretion.[5] Indeed, a trial court's decision in this regard should only be reversed on appeal when there is a *clear* abuse of that discretion.[6] "An abuse of discretion involves far more than a difference in judicial opinion."[7] "Rather, an

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[5] *Koy*, *supra* at 657.

[6] *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94-95; 666 NW2d 623 (2003).

[7] *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes."[8] "Moreover, although the law favors the determination of claims on the merits, it has also been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered."[9]

B. GOOD CAUSE

"Good cause" can be shown by: " ' " (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand." ' "[10] Spence Brothers argues that the complex nature of this matter ultimately led to the confusion between it and Amerisure that caused the answer to be late, which constituted good cause. We disagree.

(1) PROCEDURAL DEFECT OR IRREGULARITY

There was, and is, considerable dispute about the exact date the answer to the complaint was due. Under MCR 2.108(A)(1), Spence Brothers had 21 days to answer after being served with the complaint on June 23, 2006. However, as noted earlier, Shawl's attorney and Amerisure agreed on a 30-day extension, which Shawl contends ran from the date on which Amerisure asked for

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[8] *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

[9] *Alken-Ziegler*, *supra* at 229 (citation omitted).

[10] *Levitt v Kacy Mfg Co*, 142 Mich App 603, 608; 370 NW2d 4 (1985), quoting *Bigelow v Walraven,* 392 Mich 566, 576 n 15; 221 NW 2d 328 (1974), quoting 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 662.

the extension. Shawl points to the written confirmation stating that the new deadline was August 8, 2006. Despite the letter, Spence Brothers contends that the new deadline was intended to be 30 days from the original deadline to answer, which was July 14, 2006.

We conclude that the letter stating the August 8, 2006, date unequivocally set forth the intended expiration of the agreed-upon extension. However, even assuming that the 30-day extension ran from the original deadline to answer, Spence Brothers failed to answer in the time allowed. Thirty days from July 14, 2006, was Sunday, August 13, 2006. Because August 13 was a Sunday, Spence Brothers actually would have had until the end of Monday, August 14, 2006, to answer the complaint.[11] Regardless, Spence Brothers *still* failed to file an answer within the time allocated. Thus, we conclude that no procedural defect or irregularity was present to support a finding of good cause.

(2) REASONABLE EXCUSE

We next turn to the second factor of the "good cause" test: " ' "a reasonable excuse for failure to comply with the requirements which created the default." ' "[12] With respect to this factor, we initially conclude that Spence Brothers' default was clearly caused by Amerisure's

[11] MCR 1.108(1) states:

> The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or holiday on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or holiday on which the court is closed pursuant to court order.

[12] *Levitt*, *supra* at 608, quoting *Bigelow, supra*, quoting *Honigman*, *supra*.

negligence in failing to answer the complaint. There is no dispute that Amerisure's agent knew of, and indeed established, the August 8, 2006, deadline. And, again, even assuming there was some confusion that may have led Amerisure to believe it had until August 14 to file the answer, it has offered no reasonable excuse to explain its ultimate failure to respond. The salient question, however, is whether Amerisure's negligence should be imputed to Spence Brothers.

(a) CONFLICTING CASES

There is, we believe, a conflict in the pre-November 1990 published opinions[13] of this Court regarding whether to impute the negligence of an insurance company to a defendant.

(*i*) *WALTERS*

We start with *Walters v Arenac Circuit Judge*. There, Justice O'HARA, joined by Justices DETHMERS and KELLY, stated, "It is well settled that the negligence of either the attorney or the litigant is not normally grounds for setting aside a default regularly entered."[14] However, in *Walters*, neither the attorney nor the plaintiff was negligent; rather, the culpable negligence was that of the insurer. Under the circumstances, Justice O'HARA reasoned that the insurer's negligence should not be

[13] MCR 7.215(J)(1) (stating that, absent subsequent reversal or modification, this Court is bound to follow the precedent established by Court of Appeals decisions issued on or after November 1, 1990).

[14] *Walters v Arenac Circuit Judge*, 377 Mich 37, 46; 138 NW2d 751 (1966) (opinion by O'HARA, J., joined by DETHMERS and KELLY, JJ.). See also *Amco Builders & Developers, Inc*, *supra* at 96 ("[G]enerally, an attorney's negligence is attributable to that attorney's client[.]").

imputed to the insured, a doctor, and that the circuit court did not abuse its discretion in setting aside the default. More specifically, Justice O'HARA explained:

> The doctor averred he did what any reasonably prudent person would do under the circumstances when he was personally served. He turned the "papers" over to his insurance company. We do not consider him obligated to call daily to see whether the insurer did what it had contracted and accepted a premium to do. We find no neglect on his part disclosed by the record before us.
>
> The culpable negligence was that of the involved insurer. The question is then whether that negligence of the unnamed defendant liability insurer, should be imputed to and be conclusive upon the defendant doctor.
>
> We recognize that in the realities of this situation, irrespective of the named defendant, the real defendant, to the extent of the policy provisions, was the insurer. This conclusion is record-supported by the fact that when counsel received the term calendar showing the named doctor-defendant to be in default, he communicated not with the doctor but with his insurer. It seems an inescapable conclusion that the insurer directed the communicating counsel to appear and answer.
>
> On the merits of the main case, the doctor-defendant may have been blameless beyond question. He may have been in legal dimension answerable. The question is not before us. It has not been meritoriously litigated under our system of determination of that issue.
>
> The trend of our jurisprudence is toward meritorious determination of issues. The complexities of our economic system placed the named defendant-doctor in the position of having no way to reach trial on the merits because his insurer was negligent. The money judgment, if such resulted, might have to be paid in full or in part by the insurer. Absent doing violence to the rules of the jurisprudential game, we think the doctor should be entitled to his day in court.

> By this holding we would not be understood to dilute the well-settled law of this jurisdiction that the neglect of a personally served defendant, nor that of his counsel, may not ordinarily be grounds for setting aside a default regularly entered.[15]

Accordingly, the lead opinion in *Walters* affirmed the trial court's decision to set aside the default judgment.

However, as noted, only Justices O'HARA, DETHMERS, and KELLY took part in the lead opinion. Justices BLACK and SMITH concurred in the result without providing any supporting rationale,[16] and Chief Justice KAVANAGH, joined by Justices SOURIS and ADAMS, dissented.[17] Thus, *Walters* created no binding precedent because no majority of justices signed the lead opinion.[18]

(*ii*) *FREEMAN*

In *Freeman v Remley*, the defendant in an automobile accident suit sent the summons and complaint to his insurer.[19] The defendant heard nothing else about the case until he received notice of the default judgment. The insurer denied all knowledge of the claim.[20] In denying the defendant's motion to set aside the default judgment, the trial court noted that the defendant "might have had a good and valid defense," but found it significant that "there was at least notice to an agent of the insurer, that the pleadings were properly

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[15] *Id*. at 46-47 (opinion by O'HARA, J., joined by DETHMERS and KELLY, JJ.) (citations omitted).

[16] *Id*. at 48 (BLACK and SMITH, JJ., concurring).

[17] *Id*. at 48-56 (KAVANAGH, C.J., and SOURIS and ADAMS, JJ., dissenting).

[18] See *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244, 248; 570 NW2d 304 (1997) (recognizing that a lead opinion of the Michigan Supreme Court signed by only three justices was not binding on this Court).

[19] *Freeman v Remley*, 23 Mich App 441, 443; 178 NW2d 816 (1970).

[20] *Id*. at 444.

served and that an additional letter was sent notifying the insurer of commencement of suit."[21]

On appeal, the defendant contended that the case at hand was "virtually indistinguishable" from *Walters*.[22] However, without directly commenting on the defendant's argument, and while noting that Justice O'HARA's opinion in *Walters* "capture[d] the current trend in the law," the *Freeman* panel concluded without further elucidation that, "given the facts and circumstances here presented," the trial court did not *clearly* abuse its discretion in refusing to set aside the default judgment.[23]

From what we can ascertain from its brief analysis, the *Freeman* panel essentially chose to employ a strict adherence to the abuse of discretion standard of review rather than follow the rationale provided by the lead opinion in *Walters*. We further note that, in concluding that the trial court did not abuse its discretion, the *Freeman* panel cited *Hartman v Roberts-Walby Enterprises, Inc*.[24] However, the significance of that citation is questionable in that the *Hartman* Court declined to reverse the trial court's denial of the defendant's motion to set aside a default because the defendant failed to show a meritorious defense. Yet, in *Freeman*, the trial court recognized that the defendant "might have had a good and valid defense[.]"

(*iii*) *ASMUS*

In *Asmus v Barrett*, this Court stated that *Freeman* had "ruled by implication that the negligence of an

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[21] *Id*.

[22] *Id*. at 446.

[23] *Id*. at 446, 448, citing *Walters*, *supra* at 47 (stating that a trial court's decision on a motion to set aside a judgment should not be disturbed absent a *clear* instance of abuse of discretion).

[24] *Hartman v Roberts-Walby Enterprises, Inc*, 17 Mich App 724, 726; 170 NW2d 292 (1969).

insurer can and would be imputed to the insured," and opined that "[t]o hold otherwise would be to grant insurance companies an automatic right to vacation of all default judgments."[25]

In analyzing the trial court's refusal to set aside the default, the *Asmus* panel assumed, but did not decide, that certain personnel problems at the defendants' insurance company constituted good cause for the defendants' failure to timely answer.[26] Ultimately, however, the *Asmus* panel affirmed the trial court on the ground that the defendants' affidavits did not support a meritorious defense.

(*iv*) *LEVITT*

In *Levitt v Kacy Mfg Co*, a panel of this Court took a slightly different approach with regard to the issue whether the insurer's negligence should be imputed to the defendant. The Levitts sued Kacy Manufacturing Company under a product liability theory.[27] Kacy then apparently sent the summons and complaint to its insurance broker, which in turn passed them on to an insurance management company. However, the insurance management company's relationship with the insurer had been severed earlier that year. The Levitts then filed a default. Shortly thereafter, the insurance management company notified the Levitts' attorney that the insurer was in receivership and that no work would be completed on the case for another month.[28] Approximately a week later, the Levitts moved for a default judgment. Kacy then moved to set aside the

[25] *Asmus v Barrett*, 30 Mich App 570, 574-575; 186 NW2d 819 (1971).

[26] *Id*. at 574.

[27] *Levitt*, *supra* at 605.

[28] *Id*. at 606.

default, but the trial court denied the motion because, although the affidavit of facts showed a meritorious defense, Kacy had not shown excusable neglect. The trial court then awarded the Levitts a default judgment.

On appeal, the *Levitt* panel cited *Asmus* and stated that "[t]he negligence of an insurer resulting in a default can and will be imputed to the insured."[29] Yet, the panel recognized that "the mere existence of negligence does not prevent a finding of good cause."[30] The *Levitt* panel then reasoned as follows:

> [The trial judge] did not address the specific negligence that occurred in this case but focused on the problem of companies insulating themselves from default procedures by engaging multiple levels of insurance personnel who must handle suit papers. [The trial judge] would seem to require that a defendant send litigation papers which are served on him directly to his insurer or else proceed "at their own peril". We do not believe the specific facts of this case justify the application of such a generalized policy towards this defendant's employment practice.
>
> Apparently, when defendant's insurer went into receivership, its relationship with [the insurance management company] was severed without adequate notice to defendant or the insurance management company. Thus, the suit papers were erroneously sent to [an insurance management company representative], who, before the insurer was placed in receivership, had handled the claims during the prelitigation stage. *We believe that the errors in providing notice and in handling the suit papers, arising out of the unusual problems associated with the insurer's being in receivership, provide a reasonable excuse for defendant's delay in filing an answer to plaintiff's complaint*.[31]

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[29] *Id*. at 609.

[30] *Id*., citing *Walters*, *supra*, and *Asmus*, *supra* at 574.

[31] *Id*. at 609-610.

In sum, although adopting a general rule that the insurer's negligence in failing to answer will be imputed to a defendant, the *Levitt* panel nevertheless found good cause to set aside the default because of certain special circumstances that constituted a reasonable excuse for Kacy's delay in answering.

(*v*) *FEDERSPIEL*

In *Federspiel v Bourassa*, Larry Federspiel was injured when Gerald Bourassa hit him with his automobile.[32] Federspiel filed a complaint alleging negligence against Bourassa and Marcia Holland, whose employee served Bourassa alcohol before the accident. Bourassa settled with Federspiel. Holland forwarded the summons and complaint to her insurer, who then forwarded the summons and complaint to an insurance broker.[33] The insurer, however, was unaware that the insurance broker had gone out of business a couple months before the summons and complaint were sent.[34] Apparently during the process of the insurance broker's records being moved to another agency, Holland's claim was misplaced. Therefore, counsel was never assigned to timely answer the complaint, and, as a result, the trial court entered a default and default judgment against Holland.[35] Holland moved to set aside the default, and the trial court granted the motion on the basis of excusable neglect and good cause.[36] Federspiel appealed, disputing the trial court's finding that the failure of Holland's insurer to provide her with representation constituted good cause to set aside the default.[37]

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[32] *Federspiel v Bourassa*, 151 Mich App 656, 658; 391 NW2d 431 (1986).

[33] *Id*. at 658-659, 661.

[34] *Id*. at 661.

[35] *Id*. at 659, 661.

[36] *Id*. at 658, 659.

[37] *Id*. at 660.

The *Federspiel* panel first noted that "Michigan lacks definitive case law on the issue of whether an insurer's or its intermediaries' negligence ought to be imputed to the insured to preclude a finding of 'excusable neglect' and 'good cause.' "[38] The panel then adopted the reasoning employed in *Walters*.[39] The *Federspiel* panel recognized that the split decision in *Walters* was not controlling precedent and that Court of Appeals cases issued after *Walters* "diluted its impact," yet the panel stated that it was nevertheless "impressed with the logic" of the *Walters* "well-reasoned approach to the problem at hand."[40] The *Federspiel* panel therefore concluded that "[t]he insured defendant in the present situation should not be denied her day in court because of the insurer's negligence in processing her claim."[41] The panel also concluded that the insurer's "failure to answer for or defend [Holland] was the culmination of events which amounted to excusable neglect."[42] Finally, the *Federspiel* panel found that manifest injustice would result if the default judgment were permitted to stand, noting that evidence supported a meritorious defense that Bourassa was not actually intoxicated at the time of the accident. Accordingly, the panel affirmed the trial court's decision to set aside the default judgment.[43]

Notably, the *Federspiel* panel distinguished the facts presented from other cases where this Court affirmed denials of motions to set aside default judgments:

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[38] *Id*. at 661.

[39] *Id*.

[40] *Id*. at 663.

[41] *Id*.

[42] *Id*.

[43] *Id*. at 658, 664.

> In *Freeman*, the insurer was reckless in ignoring notice of the suit and this [C]ourt upheld the trial court's exercise of discretion in denying the motion to set aside the default. In both *Asmus* and *Van Haaften* [*v Miller-Davis Co*, 54 Mich App 186; 220 NW2d 752 (1974)], the defendants lacked a meritorious defense, which is not the case here.[44]

(*vi*) CONCLUSION

Unfortunately, now 20-plus years after *Federspiel*, Michigan still "lacks definitive case law on the issue of whether an insurer's or its intermediaries' negligence ought to be imputed to the insured to preclude a finding of 'excusable neglect' and 'good cause.' "[45] Given this lack of solid precedent on which to rely, and despite the nonbinding nature of the lead opinion in *Walters*, we, like the *Federspiel* panel, are persuaded by the logic of *Walters*. That case clearly articulates the well-reasoned rule that an insurer's negligence should not be conclusive on the procedurally nonnegligent defendant.[46] A defendant who diligently turns over a case to an ultimately negligent insurer should not be denied his or her day in court. The defendant is not "obligated to call daily to see whether the insurer did what it had contracted and accepted a premium to do."[47]

In following *Walters*, we specifically reject the rule implied by *Freeman*, and later taken up by *Asmus*, that the negligence of the insurer should be presumptively imputed to the defendant. To hold otherwise may result in the unfavorable consequence of denying defendants

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[44] *Id*. at 663 n 2.

[45] *Id*. at 661.

[46] We distinguish *procedurally* nonnegligent defendants from defendants who are alleged to be negligent with respect to the substance of the plaintiff's claim.

[47] *Walters*, *supra* at 46.

who "might have had a good and valid defense"[48] a chance at the meritorious determination of the issues. "[T]he law favors the determination of claims on the merits . . . ."[49]

We further believe that employing an analysis like that in *Levitt*, in which the panel found that "unusual problems associated with the insurer's being in receivership" provided a reasonable excuse for the defendant's delay, merely serves to complicate the issue. Whether the insurer's negligence was a mere oversight in failing to meet the filing deadline or whether it is the result of some other complication, the end result is that the nonculpable defendant is unfairly punished for trusting that his or her insurer was doing its job.

We are cognizant of the *Asmus* panel's concern that not to apply a blanket rule imputing the insurer's negligence to the defendant might be viewed as granting "insurance companies an automatic right to vacation of all default judgments."[50] However, our conclusion here that an insurance company's negligence in failing to answer a complaint constitutes a reasonable excuse under the good cause test for setting aside a default does not dilute a defendant's duty to nevertheless show a meritorious defense supported by an affidavit of facts.[51] Indeed, in *Asmus*, despite ostensibly imputing the insurer's negligence to the defendant, the panel nevertheless decided the case on the ground that the defendant did not demonstrate a meritorious defense.

In keeping with *Walters*, we conclude that Amerisure's negligence should not be imputed to Spence

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[48] *Freeman*, *supra* at 444.

[49] *Alken-Ziegler*, *supra* at 229.

[50] *Asmus*, *supra* at 574-575.

[51] See MCR 2.603(D)(1).

Brothers and that Amerisure's negligence in failing to answer the complaint constituted a reasonable excuse, under the good cause test, to set aside the default.

(b) COMMUNICATION BETWEEN ATTORNEY AND INSURANCE REPRESENTATIVE

We acknowledge Spence Brothers' argument that Shawl's attorney should not have communicated with Rigdins because she was a "non-lawyer." However, as the trial court stated, "I see no problem with the insurance agent, the person charged contractually with—to act on behalf of the defendant to engage in the extension of time agreements." Indeed, Rigdins was a senior claims representative for Amerisure. Therefore, the trial court did not abuse its discretion in determining that the communication between Rigdins and Shawl's attorney was not a reasonable excuse that showed good cause to set aside the default.

C. MERITORIOUS DEFENSE

Spence Brothers argues that it presented a meritorious defense under MCR 2.603(D)(1). "[I]f a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent a manifest injustice."[52] However, as *Alken-Ziegler* makes clear, the good cause and meritorious defense elements of MCR 2.603(D)(1) are not to be blurred; they are "separate requirements."[53] Thus, Spence Brothers must show a meritorious defense to have the default set aside under MCR 2.603(D)(1).

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[52] *Alken-Ziegler*, *supra* at 233-234.

[53] *Id*. at 230-231.

In Michigan, as a matter of public policy, the subcontractors on a job site have a duty to ensure the worksite is safe for their employees.[54] Further, a general contractor is not liable for a subcontractor's negligence.[55] However, a general contractor may be found liable if it failed to take "reasonable steps within its supervisory and coordinating authority" to protect workers from "readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen."[56] In what is often referred to as the *Funk* four-part test,

> a plaintiff must show that (1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area.[57]

Spence Brothers argues that it is impossible for Shawl to recover under the *Funk* four-part test. Spence Brothers asserts that its affidavit demonstrates that at least one of the elements under the *Funk* four-part test is missing and, thus, it has presented a meritorious defense. In its affidavit, Spence Brothers stated that "[a]ny danger created by the allegedly faulty electrical panel was not readily observable by Spence Brothers." Spence Brothers also stated, "Any danger created by the allegedly faulty electrical panel presented a danger to

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[54] See *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 6; 574 NW2d 691 (1997).

[55] *Signs v Detroit Edison Co*, 93 Mich App 626, 632; 287 NW2d 292 (1979).

[56] *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53-54; 684 NW2d 320 (2004), quoting *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on another ground in *Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29 (1982).

[57] *Ormsby*, *supra* at 54.

only a small number of workers since the painting subcontractor, Boice Bird & Sons, requested that the electrical panel be made mobile for purposes of their work." If proven, these assertions might well be a defense to Shawl's claim. Therefore, we conclude that Spence Brothers has met its burden by filing an affidavit of facts showing a meritorious defense.

D. MANIFEST INJUSTICE

The Supreme Court has clarified the manifest injustice factor of the "good cause" test as follows:

> The first two prongs of the Honigman & Hawkins "good cause" test are unremarkable and accurately reflect our decisions. It is the third factor, "manifest injustice," that has been problematic. The difficulty has arisen because, properly viewed, "manifest injustice" is not a discrete occurrence such as a procedural defect or a tardy filing that can be assessed independently. Rather, manifest injustice is the result that would occur if a default were to be allowed to stand where a party has satisfied the "meritorious defense" and "good cause" requirements of the court rule. When a party puts forth a meritorious defense and then attempts to satisfy "good cause" by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the "good cause" showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of "good cause" will be required than if the defense were weaker, in order to prevent a manifest injustice.[58]

To reiterate, we conclude that Amerisure's negligence should not be imputed to Spence Brothers and that Amerisure's negligence in failing to answer the complaint constituted a reasonable excuse under the

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[58] *Alken-Ziegler, Inc*, *supra* at 233-234.

good-cause test to set aside the default. We further conclude that Spence Brothers has met its burden by filing an affidavit of facts showing a meritorious defense. Therefore, we conclude that permitting the default to stand, by following a rule that would perfunctorily impute Amerisure's negligence to Spence Brothers, would result in manifest injustice.

E. TOTALITY OF THE CIRCUMSTANCES

In light of the previously unsettled state of the law on the issue whether an insurer's or its intermediaries' negligence ought to be imputed to the insured to preclude a finding of "excusable neglect" and "good cause," we offer additional guidance for future cases. There are multiple types of cases, both civil and criminal, where caselaw provides factors to the trial courts to weigh and balance before reaching a decision based on the totality of the circumstances.[59] Because the grant or denial of a motion to set aside a default judgment is examined under the same standard of review and is similarly fact-intensive, we believe that it would be helpful to the trial courts if we provided additional factors for them to use in their evaluations of "good cause" and "meritorious defense" under MCR

[59] See *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992) (determining alimony is within the trial court's discretion and involves consideration of certain enumerated factors); *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988) (whether a confession is voluntary requires reviewing factors and making a determination on the basis of the totality of the circumstances); *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998) (a suggestive identification procedure is only improper where, after reviewing certain relevant factors, the totality of the circumstances indicates a substantial likelihood of misidentification); *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998) (custody determinations are made on the basis of the best interest of the child in light of the trial court's findings with regard to 12 specific factors).

2.603(D)(1). We emphasize that trial courts should base the final result on the totality of the circumstances.

We base the need for a "totality of the circumstances" test in part on the broad elements considered in the cases discussed earlier and in part on the Michigan Supreme Court's recognition that although "good cause" and a "meritorious defense" are separate requirements that may not be blurred and that a party must have both,[60] there is some interplay between the two: "[I]f a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent a manifest injustice."[61] With an already existing relationship between the two requirements, we believe that balancing these factors to come up with an overall assessment under the totality of the circumstances provides a better, more easily applied rule because it supplies a flexibility that takes into consideration the variable, fact-intensive nature of default cases, avoiding bright-line distinctions that fail to balance the dueling public policy issues of having cases decided on the merits and not setting aside properly entered default judgments. With respect to the present facts, such a test avoids the two extremes of automatically imputing an insurer's negligence to a defendant or automatically giving the insurer a free pass to void any default judgment.

To reiterate, the following lists are intended to provide guidance to the trial courts in determining whether a party has shown "good cause" and a "meritorious defense" under MCR 2.603(D)(1) such that setting aside a default judgment is proper under the totality of the circumstances.

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[60] *Alken-Ziegler, Inc*, *supra* at 230-231, 233-234.

[61] *Id.* at 233-234.

In determining whether a party has shown good cause, the trial court should consider the following factors:

(1) whether the party completely failed to respond or simply missed the deadline to file;

(2) if the party simply missed the deadline to file, how long after the deadline the filing occurred;

(3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment;

(4) whether there was defective process or notice;

(5) the circumstances behind the failure to file or file timely;

(6) whether the failure was knowing or intentional;

(7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4);[62]

(8) whether the default judgment results in an ongoing liability (as with paternity or child support); and

(9) if an insurer is involved, whether internal policies of the company were followed.

In determining whether a defendant has a meritorious defense, the trial court should consider whether the affidavit contains evidence that:

(1) the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement;

(2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7) or (8); or

(3) the plaintiff's claim rests on evidence that is inadmissible.

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[62] For example, it seems illogical to set aside a default judgment where the amount of fees and costs to be awarded under MCR 2.603(D)(4) will be greater than or roughly equal to the amount of the default judgment, as the defendant will pay the same amount, whether in costs if the judgment is set aside or under the judgment if it is not.

Neither of these lists is intended to be exhaustive or exclusive. Additionally, as with the factors provided in other contexts, the trial court should consider only relevant factors, and it is within the trial court's discretion to determine how much weight any single factor should receive.[63]

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

O'CONNELL, J. (*concurring*). I concur with the majority opinion that the trial court, when deciding whether to grant or deny a motion to set aside a default judgment, must examine the totality of the circumstances. I also join in the majority's conclusion to reverse the trial court's decision. I write separately to advocate the totality of the circumstances test and to emphasize that the Michigan Court Rules are not "a procedural tightrope upon which a litigant must balance carefully and perfectly" or be thrown out of court. *Gering v Anderson Villas, LLC*, unpublished opinion per curiam of the Court of Appeals, issued May 13, 2008 (Docket No. 275940), at 3.

At the outset, I stress that this opinion is not intended as an analysis or criticism of either the trial court or the majority's methodology in resolving this case, but as an opportunity to address and reduce the gamesmanship that creates hostile attitudes and fric-

[63] See *Sparks*, *supra* at 159-160 (in determining alimony, the trial court determines what factors are significant and how much weight to assign to each factor; the factors listed are not exclusive); *Cipriano*, *supra* at 334-335 (no single factor is conclusive of the issue); *People v Kachar*, 400 Mich 78, 93-94, 97; 252 NW2d 807 (1977) (factors used to determine whether an independent basis for an in-court identification exists are not inclusive or exclusive and the weight given to each is within the trial court's discretion); *McCain*, *supra* at 131 (a trial court need not give equal weight to all the best-interest factors in child custody decisions).

tion among litigants, lawyers, and the bench. Some attorneys maintain that gamesmanship is a fundamental and ingrained aspect of the legal process, and that attempts to compete with or outdo their opponents are not only appropriate but also required for zealous advocacy. I contend, however, that this gamesmanship attitude, which is all too prevalent in today's law practice, is more destructive than helpful, because it brings disrespect upon the law, the litigants, and our shared concept of justice. Although I have no illusions that the game theory of law practice will be eliminated, I remain hopeful that this gamesmanship can be reduced through the application of the totality of the circumstances test to the process of administering justice. Indeed, one purpose of this opinion is to ignite discussion on the topic.

I begin with the proposition that the litigation process is best described as "conflict within a set of rules." Stated another way, lawsuits generally involve a disagreement between conflicting parties, and the Michigan Court Rules provide a set of rules designed to help resolve this conflict. Consequently, a judge's role is to resolve the conflict within the strictures of the Michigan Court Rules. These rules are designed to create consistency and a level playing field for all participants in the dispute resolution process.

The law favors the determination of claims on their merits. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999). Dismissals and defaults are the system's mechanism for sanctioning those whose conduct does not fall within the confines of the rules. See MCR 2.504(B)(1); MCR 2.313(B)(2)(c); *Mink v Masters*, 204 Mich App 242, 243-245; 514 NW2d 235 (1994). Litigants who purposefully and repeatedly act outside the scope of, or fail to

follow clear and concise, rules deserve special and prompt attention from the court. However, if a timely meritorious claim or defense is alleged and the conflict of the parties reasonably falls within the set of rules at issue, the law favors a lesser sanction than default or dismissal. See MCR 2.603(D)(1). But not all cases are meritorious and not all defenses are worth pursuing, particularly if the costs of litigation exceed the benefits or burdens to the parties. That is why, in my opinion, the best manner in which to balance these issues and reach a fair and just decision is to weigh the totality of the circumstances.

Every case is different, with factual nuances that must be identified, evaluated, and balanced to reach a proper result. Only an experienced judge with common sense, wisdom, and a sense of justice is empowered by our constitution to make the correct decision. It is the judge who also exercises patience that generally uses the correct process. However, a judge who focuses solely on a *single* process, to the exclusion of all else, sometimes experiences methodological tunnel vision.[1] The process then becomes perfunctory and often results in unjust, illogical, and incongruous outcomes.

I find this occurs most often where, as in this case, "procedure is substance." The merits of the case are left in the wake created by the procedural rules. In such

[1] The reader may interpret this statement as a criticism of textualism. It is not. In my opinion, all good judges begin the resolution of a controversy with the text of the statute or court rule. A principled decision with a principled outcome is the goal of any decision-making process. I use this language only in the sense that the practical constraints involved in drafting court rules impose what may occasionally resemble methodological tunnel vision. Good judges will have the common sense and wisdom to integrate, where necessary, the rules, the comments to the rules, and caselaw into a fully articulated and intellectual framework.

cases, the manner in which the procedural rules are implemented can be more important than the substance of the case. The journey becomes more important than the destination. The totality of the circumstances test is an attempt to distinguish those occasions when the bright-line application of the rules is appropriate (such as dismissal for failure to file within the statute of limitations) with situations where the rules themselves involve abstract concepts of justice (as with the use of the term "good cause" in the default judgment context). In the latter case, the art of judging cannot become a mechanical or computer-like process.

Indeed, both this Court and our Supreme Court have dismissed the notion of judging as a mechanical process. " '[Rules of practice and procedure] must be followed but they must also be thought of as guides and standards to the means of achieving justice, not the end of justice itself.' " *Higgins v Henry Ford Hosp*, 384 Mich 633, 637; 186 NW2d 336 (1971),[2] cited with approval in *People v Grove*, 455 Mich 439, 469-470 n 36; 566 NW2d 547 (1997). "Judging is an art," and the role of a judge is not that of a computer plugging facts into a formula and spitting out results. *Nippa v Botsford Gen Hosp* (*On Remand*), 257 Mich App 387, 393-394 n 5; 668 NW2d 628 (2003). Indeed, the very nature of the rules con-

[2] The quotation comes from the official committee comment to GCR 1963, 13 (replaced in 1985 with MCR 1.105) and reads in full:

> "Rules of practice and procedure are exactly that. They should create no rights and should be thought of as indicating the way in which justice should be administered. They should give direction to the process of administering justice *but their application should not become a fetish to the extent that justice in an individual case is not done*. There is a need for guides and standards. They must be followed but they must always be thought of as *guides and standards to the means of achieving justice, not the end of justice itself*." [*Higgins*, *supra* at 637.]

firms that "[n]o computer will ever be able to replace the role of judge in our society, and no computer or mechanical device can function at the level of a judge." *Id.* at 393 n 5. MCR 1.105 provides that a trial court should construe the rules "to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." Computers input data and spit out results. They cannot comprehend, let alone administer, something as non-formulaic as justice.

Accordingly, I conclude that a decision to set aside a default judgment must be based on the totality of the circumstances and an individualized assessment of the facts and conditions of the specific case. Because the majority opinion takes this position into account and, because under the totality of the circumstances test the trial court erred in failing to set aside the default judgment, I concur in the result reached by the majority opinion.

PEOPLE v PERKINS
PEOPLE v LESAGE

Docket Nos. 281957 and 281959. Submitted August 6, 2008, at Lansing. Decided August 19, 2008, at 9:05 a.m. Leave to appeal sought.

James D. Perkins and Joseph W. Lesage were each charged after January 1, 2007, in the Isabella County Trial Court, Circuit Court Division, with, among other offenses, operating a motor vehicle while under the influence of alcoholic liquor, third offense. Perkins had been convicted of drunken driving offenses on September 21, 1990, February 3, 1992, May 19, 1993, and June 22, 2005. Lesage had been convicted of drunken driving offenses on April 8, 1975, June 8, 1991, and July 16, 1991. 2006 PA 524, also known as Heidi's Law, had amended MCL 257.625(9)(c) to provide, effective January 3, 2007, that a violation under MCL 257.625(1) or (8), which normally would be a misdemeanor, will be punishable as a felony if the violation occurs after two or more prior convictions, regardless of the number of years that have elapsed since any prior conviction. Before the amendment, an offense under the statute was a felony only if the offender had two or more prior convictions within the previous 10 years. Perkins and Lesage each moved to quash the charge of operating a motor vehicle while under the influence of alcoholic liquor, third offense. The court, Paul H. Chamberlain, J., initially denied the motions but later granted them on reconsideration, ruling that only prior convictions that occurred after January 3, 1997 (10 years before Heidi's Law took effect), could be considered for punishment enhancement, because it would constitute a violation of the ex post facto clauses of the United States and Michigan constitutions to consider prior convictions that occurred before January 3, 1997. The prosecution appealed by leave granted.

The Court of Appeals *held*:

The ex post facto clauses of the federal and state constitutions prohibit legislative bodies from enacting laws that criminalize an act after its commission. Ex post facto laws share two elements: they attach legal consequences to acts before their effective date and they work to the disadvantage of a defendant. Heidi's Law made the consequences of the defendants' offenses more severe on

the basis of the defendants' prior convictions. All of the defendants' prior convictions properly may be considered for the purposes of applying amended MCL 257.625(9)(c).

Reversed and remanded for further proceedings.

CONSTITUTIONAL LAW — EX POST FACTO LAWS.

An ex post facto law, which is prohibited by the United States and Michigan constitutions, is one that attaches legal consequences to acts before the law's effective date and works to the disadvantage of a criminal defendant (US Const, art I, § 10, cl 1; Const 1963, art 1, § 10).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Larry J. Burdick*, Prosecuting Attorney, and *Mark G. Kowalczyk*, Senior Assistant Prosecuting Attorney, for the people.

Daniel R. O'Neill and *Rosemary Gordon Panuco* for the defendants.

Amicus Curiae:

Christopher E. Goggin, *in propria persona*.

Before: MARKEY, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM. The prosecution appeals by leave granted the trial court's decision on reconsideration to grant defendants' motions to quash. The trial court originally determined that all prior drunken driving convictions could properly be considered for purposes of enhancing a sentence under MCL 257.625. However, on reconsideration, the trial court concluded that it had erred in its earlier determination. And it agreed with defendants' contention that only convictions that occurred after January 3, 1997, which was 10 years before the date that amended MCL 257.625 became effective,[1]

[1] See 2006 PA 564.

could be considered for purposes of sentence enhancement. We conclude that, for offenses occurring after the effective date of amended MCL 257.625, the state may properly charge defendants on the basis of prior convictions that occurred more than 10 years before the date of the amendment. Therefore, we reverse the trial court's decision to quash and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. PERKINS

Defendant James D. Perkins was arrested on March 23, 2007, for driving a vehicle while intoxicated and was charged with three offenses, including operating a motor vehicle while intoxicated (OWI), third offense,[2] possession of marijuana,[3] and driving with a suspended, denied, or revoked license, second or subsequent offense.[4] Perkins had four prior alcohol-related convictions at the time of the hearing, including: (1) in Oakland County, operating while visibly impaired (September 21, 1990); (2) in Oakland County, operating under the influence (February 3, 1992); (3) in Genesee County, operating under the influence (May 19, 1993); and (4) in Genesee County, OWI (June 22, 2005).

B. LESAGE

Defendant Joseph W. Lesage was charged with OWI, third offense, on May 21, 2007. Lesage had three prior alcohol-related convictions: (1) OWI[5] (April 8, 1975); (2)

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[2] MCL 257.625(1)(a).

[3] MCL 333.7403(2)(d).

[4] MCL 257.904(1).

[5] The trial court did not specify the county in which Lesage was convicted of his prior offenses.

operating while impaired (June 8, 1991); and (3) impaired driving (July 16, 1991).

C. "HEIDI'S LAW"

Because both defendants had committed two or more prior alcohol-related offenses, they were subject to enhanced sentences under 2006 PA 564—also known as "Heidi's Law." Before the trial court, defendants argued that Heidi's Law was unconstitutional because it "(1) . . . violate[d] the rule prohibiting ex-post [sic] facto application of laws; (2) [was] not intended to include prior convictions that were time barred when the statute was passed based on statutory construction; and (3) [was] a violation of due process." At the end of the hearing on defendants' motion to quash, the trial court agreed with the prosecution and denied defendants' motion to quash the information because the law was constitutional and did "not violate the rule against ex post facto laws[, and its] statutory construction demonstrate[d] the intent to include convictions that would have been barred under the 10 year statute of limitations." The trial court did not rule on defendants' due-process claim, finding that it was not yet ripe for decision.

Perkins and Lesage filed motions for reconsideration on September 5, 2007, and October 2, 2007, respectively. The trial court granted the motions, ruling that it had misinterpreted the relevant caselaw and committed "palpable error." The trial court concluded that its earlier analysis concluding that application of the law in this case was not ex post facto was incorrect, and determined instead that Heidi's Law "does not apply to events that have been neutralized by the prior statute of limitations period without the amendment being ex-post [sic] facto." According to the trial court, "any

conviction that occurred prior to January 3, 1997 is time barred and cannot be considered when Heidi's Law is being applied to a case. . . . [B]y using this date as a guide, defendants whose claims were neutralized can still use that as a proper defense." The prosecutor now appeals.

II. EX POST FACTO LAWS

A. STANDARD OF REVIEW

This Court reviews a trial court's decision to grant or deny a motion for reconsideration for an abuse of discretion.[6] We review issues of statutory construction and interpretation of constitutional provisions de novo.[7]

B. VIOLATIONS OF THE EX POST FACTO DOCTRINE

In its August 20, 2007, ruling, the trial court denied defendants' motions to quash the information, concluding that the law at issue was constitutional and that the Legislature had clearly intended "to include convictions that would have been barred under the 10 year statute of limitations" when it enacted Heidi's Law. Furthermore, the court held that "no subsequent behavior . . . is being punished by application of Heidi's Law," and the law did not deny defendants any defense. The court also cited *People v Russo*,[8] stating that that case directs courts to

> look at . . . the status of the law at the time the act is committed . . . . At the time [the offenses in the instant case] were committed, the new statute . . . stated that any prior conviction from any time in the Defendant's criminal history could be utilized.

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[6] *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

[7] *People v Callon*, 256 Mich App 312, 315; 662 NW2d 501 (2003).

[8] *People v Russo*, 439 Mich 584; 487 NW2d 698 (1992).

> . . . So the key is the Defendant is presumed to know the law at the time he commits the act and that it's a violation of law and that's all certainly present here.

However, in granting defendants' motion for reconsideration, the trial court observed that upon "[f]urther reading and analysis of *People v Russo*, . . . this Court was wrong when it held that any offense, no matter when it occurred, could be considered in determining if a defendant can be charged with a felony." The court's new conclusion was that *Russo* holds that if the Legislature amends a statute of limitations, the "amendment does not apply to events that have been neutralized by the prior statute of limitations period without the amendment being ex-post [sic] facto." Therefore, the court determined that only convictions that occurred after January 3, 1997—ten years before the effective date of Heidi's Law—could be considered for prosecution, because that date "covers any claim that was time barred at the time the amendment was put in place. Thus, . . . defendants whose claims were neutralized can still use that as a proper defense."

The defendant in *Russo* was charged in 1989 with committing criminal sexual conduct for alleged assaults that occurred between 1978 and 1982.[9] The statutory period of limitations in effect at the time of the acts was six years, but before the running of the then-applicable limitations period, the Legislature amended the statute to extend the period in which charges could be filed from " 'within 6 years after the commission of the offense or by the alleged victim's twenty-first birthday, whichever is later.' "[10] Russo argued that the amendment was not applicable to him because it did "not specifically state that it applies to offenses arising

[9] *Id.* at 589.

[10] *Id.* at 590, quoting MCL 767.24(2).

before its effective date," and also that it violated the ex post facto clauses of the Michigan and United States constitutions.[11] The Michigan Supreme Court disagreed, holding that there was no conflict between application of the amendment to the defendant's case and the rule against ex post facto laws:

> Well-settled principles require the conclusion that applying the extended statute of limitations to the then-not-as-yet-time-barred alleged sexual assaults is not ex post facto. The sexual assaults were not innocent when committed, the quantum of punishment is unchanged, and the defendant has not been deprived of any defense available to him at the time the acts were committed. The statute of limitations defense was not available to the defendant at the time the assaults were committed or at the time the amendment became effective[, as the] Legislature amended the statute of limitations five months before the defendant had any substantive right to invoke its protection.[12]

2006 PA 564 amended the governing statute in this case.[13] Before the amendment, a defendant was guilty of a felony rather than a misdemeanor for violating the statute only if he or she had been convicted of two or more drunken driving offenses within the previous 10 years. The amendment eliminated the 10-year window and added language permitting the use of any previous conviction in enhanced sentencing, regardless of the time that elapsed between it and the defendant's current offense.[14] The statute now provides, in pertinent part, "If a person is convicted of violating subsection (1) or (8)" and "the violation occurs after 2 or more prior convictions, regardless of the number of years that have elapsed since any prior conviction, the person is guilty

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[11] *Id.* at 592.

[12] *Id.* at 593.

[13] MCL 257.625(9)(c).

[14] 2006 PA 564.

of a felony . . . ."[15] In granting defendants' motions for reconsideration, the trial court stated that *Russo* permitted the Legislature to amend a statute of limitations in regard to prior events, but such amendments do not apply to events for which the period of limitations had already run.

The ex post facto clauses of both the state and federal constitutions prohibit legislative bodies from enacting laws that criminalize an act after it has been committed.[16] In *Callon*, this Court noted that "[a]ll ex post facto laws share two elements: (1) they attach legal consequences to acts before their effective date, and (2) they work to the disadvantage of the defendant."[17] In this case, Heidi's Law certainly works to defendants' disadvantage, but the amendment did not attach legal consequences to their prior offenses, which occurred before the amendment's effective date. Rather, the amendment made the consequences of their current offenses, which occurred after January 3, 2007, more severe on the basis of defendants' prior convictions.

Thus, the trial court was incorrect when it stated that "Heidi's Law is not unconstitutional as written; but when asked to apply it in the manner that is in these cases, such application is ex-post [sic] facto and is therefore prohibited." As in *Callon*, "the amended statute did not attach legal consequences to defendant's

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[15] MCL 257.625(9)(c).

[16] US Const, art I, § 10, cl 1; Const 1963, art 1, § 10; *Russo, supra* at 592 (noting that it was well-settled that " 'any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.' "), quoting *Dobbert v Florida*, 432 US 282, 292-293; 97 S Ct 2290; 53 L Ed 2d 344 (1977).

[17] *Callon, supra* at 318 (citations omitted).

prior impaired-driving conviction, but attached legal consequences to defendant's future conduct . . . ."[18] Further, the court treated the prior 10-year limit on consideration of prior convictions as a statutory period of limitations that had run. But this analysis ignores the fact that defendants are not being prosecuted for the prior offenses. They are being prosecuted for actions that took place after the amendment took effect. As in *Callon,* the change in the predicate offenses used to raise current conduct to the felony level does not constitute an ex post facto violation.[19]

III. CONCLUSION

The trial court erred in concluding that defendants' prosecution under the amendment to MCL 257.625 violates ex post facto protections.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

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[18] *Id.*

[19] *Id.* at 320-321; see also *Gryger v Burke*, 334 US 728, 732; 68 S Ct 1256; 92 L Ed 1683 (1948) ("Nor do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive or subjects the petitioner to double jeopardy. The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.").

PEOPLE v BLACKMON

Docket No. 277184. Submitted June 10, 2008, at Detroit. Decided August 19, 2008, at 9:10 a.m. Leave to appeal sought.

Roy Blackmon was convicted by a Wayne Circuit Court jury of second-degree murder, two counts of assault with intent to murder, and possession of a firearm during the commission of a felony. The Court of Appeals, HOEKSTRA, P.J., and TALBOT and KELLY, JJ., affirmed in an unpublished opinion per curiam, issued September 14, 2001 (Docket No. 219350), concluding that nonconstitutional error and prosecutorial misconduct regarding the admission of evidence indicating that the defendant was a gang member was harmless in view of the overwhelming and untainted evidence of the defendant's guilt. The Supreme Court denied leave to appeal. 467 Mich 851 (2002). The defendant petitioned for habeas corpus relief in the United States District Court for the Eastern District of Michigan. That court ruled that the erroneous admission of gang-membership evidence, and the prosecutorial misconduct related to that evidence, resulted in an unfair trial and a deprivation of the defendant's liberty without due process of law, in violation of his rights under the United States Constitution. *Blackmon v Booker*, 312 F Supp 2d 874 (ED Mich, 2004). The United States Court of Appeals for the Sixth Circuit reversed and remanded. 394 F3d 399 (CA 6, 2004). On remand, the federal district court instructed the defendant to exhaust his state-court remedies for the federal-law violations. The defendant moved for relief from judgment in the Wayne Circuit Court. That court denied the motion. The Michigan Court of Appeals denied leave to appeal in an unpublished order, entered September 15, 2006 (Docket No. 268628). The Michigan Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 477 Mich 1125 (2007). The Supreme Court directed the Court of Appeals to consider (1) whether the error that occurred is constitutional in nature, (2) whether the Court of Appeals, on direct appeal, therefore erred in failing to apply the "harmless beyond a reasonable doubt" standard that is applied to preserved federal constitutional error, *Chapman v California*, 386 US 18 (1967), (3) if so, whether the errors committed at trial were harmless beyond a reasonable doubt, (4) whether the defendant has shown good cause for failing to raise these issues on direct appeal, and

(5) if so, whether the defendant has shown actual prejudice and is therefore entitled to postappeal relief under MCR 6.508(D)(3).

The Court of Appeals *held*:

1. In order for prosecutorial misconduct to be constitutional error, the misconduct must have so infected the trial with unfairness as to make the conviction a deprivation of liberty without due process of law. All of the prosecutorial misconduct in this case, except for the misconduct involving improper argument to the jury concerning the defendant's gang membership, related to admission of evidence and was supported by the trial court's evidentiary rulings. The misconduct consisting of improper argument to the jury did not so infect the trial with unfairness as to make the conviction a deprivation of liberty without due process of law.

2. Because the prosecutorial misconduct was nonconstitutional in nature, the Court of Appeals, on direct appeal, was not required to apply the "harmless beyond a reasonable doubt" standard.

3. Absent constitutional error, the defendant's claim that he has shown good cause and actual prejudice under MCR 6.508(D)(3) must be rejected.

Affirmed.

WHITE, J., concurring, agreed with the conclusion that where a violation of a specific constitutional right is not at issue, the standard for determining whether there has been error of a constitutional magnitude in violation of the Due Process Clause is whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process. Judge WHITE stated that the erroneous introduction of gang evidence did not make the trial in this case so unfair as to make the conviction a denial of due process. That evidence did not result in the jury's attention being redirected away from the essential question of guilt based on the evidence to the question of guilt based on association, character, or other extraneous or prejudicial factors.

1. CRIMINAL LAW — EVIDENCE — APPEAL — CONSTITUTIONAL LAW.

Evidentiary errors are nonconstitutional in nature.

2. CRIMINAL LAW — PROSECUTORIAL MISCONDUCT — CONSTITUTIONAL LAW — DUE PROCESS OF LAW.

Prosecutorial misconduct, in order to be constitutional error, must so infect the trial with unfairness as to make the conviction a deprivation of liberty without due process of law.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the people.

Steven Fishman for the defendant.

Before: MARKEY, P.J., and WHITE and WILDER, JJ.

WILDER, J. This case is before us on remand from the Michigan Supreme Court. *People v Blackmon*, 477 Mich 1125 (2007). This Court is instructed to decide

> (1) whether the error that occurred [at defendant's trial] is constitutional in nature; (2) whether the Court of Appeals, on direct appeal, therefore erred in failing to apply the "harmless beyond a reasonable doubt" standard that is applied to preserved federal constitutional error, *Chapman v California,* 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967) [overruled in part on other grounds, as recognized in *Sherley v Kentucky,* 889 SW2d 794 (Ky, 1994)]; (3) if so, whether the errors committed at trial were harmless beyond a reasonable doubt; (4) whether defendant has shown good cause for failing to raise these issues on direct appeal; and (5) if so, whether defendant has shown actual prejudice and is therefore entitled to postappeal relief under MCR 6.508(D)(3). [*Id*.]

We conclude that the claimed errors at defendant's trial were *non*constitutional in nature.

I

In April 1998, in the area of 14748 Woodmont Street in the city of Detroit, defendant shot to death one person (the murder victim, Kenneth Tinsley) and shot two other persons, who survived (Michael Hearn, who was shot twice, and Tiffiney Smith, a nine-year-old girl who was riding her bicycle at the time of the assaults).[1] All three

[1] Both of the assault victims must live the rest of their lives with bullets in their bodies.

victims were innocent bystanders. Defendant was 21 when he committed these felonies. The medical examiner, who autopsied Tinsley, found that Tinsley died from a single gunshot to his chest. The prosecutor charged defendant with first-degree premeditated murder,[2] two counts of assault with intent to murder, and one count of possession of a firearm during the commission of a felony.[3]

The prosecution argued that the crimes were gang-related and presented evidence that defendant was a member of the Schoolcraft Boys, a gang. Defendant denied that he was the shooter, presenting an alibi that he was at home at the time of the murder.

The prosecution argued that defendant's crimes were committed because he was coming to the aid of fellow gang member, Jimmy Crost. Crost had visited Keynyatta Simons's girlfriend, Nancy Ellis, who testified that Simons threatened to harm Crost and that Crost made a telephone call asking to be picked up because of some trouble. Hearn testified that defendant arrived, spoke to Crost, and then fired several shots, two of which hit Hearn as he stood near Simons.[4]

At trial, two eyewitnesses (Hearn and Arthur Anderson) testified that they saw defendant commit the crimes. This testimony tended to establish the identity of the murderer. Although the credibility of their testimony was challenged through impeachment, a jury of defendant's peers found him guilty of murder and the other charges. The trial court sentenced defendant to

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[2] Later, the first count was amended to second-degree murder.

[3] The first three counts were also leveled against a codefendant, Jimmy Crost, a fellow gang member of defendant.

[4] This evidence suggests that defendant may have intended to shoot and murder Simons (for threatening to harm Crost), but instead hit the victims.

40 to 60 years' imprisonment for the second-degree murder conviction, 3 to 10 years' imprisonment for each assault conviction, and 2 years' imprisonment for the felony-firearm conviction.

Defendant appealed. This Court determined that, in light of the other testimony indicating that defendant was the murderer, the trial court abused its discretion in admitting the testimony about defendant's gang membership, because the unfairly prejudicial nature of the testimony substantially outweighed any probative value (even though it supported the prosecution's theory). *People v Blackmon*, unpublished opinion per curiam, issued September 14, 2001 (Docket No. 219350). This Court rejected the argument that the evidence concerning gang membership was relevant to show witness intimidation[5] and motive.

This Court also concluded that presentation of the testimony indicating defendant's membership in the Schoolcraft gang was prosecutorial misconduct. Notwithstanding its conclusions that the admission of gang-membership evidence and argument concerning that evidence was erroneous and prosecutorial misconduct, this Court concluded that the errors, which it called nonconstitutional, were harmless because the untainted evidence of defendant's guilt was overwhelming. Therefore, this Court affirmed the convictions and sentences.

Defendant filed an application for leave to appeal in the Supreme Court, arguing that this Court, after finding prosecutorial misconduct and evidentiary error, should have reversed the convictions. The Supreme Court denied leave to appeal. 467 Mich 851 (2002).

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[5] It is undisputed that several witnesses were reluctant to testify against defendant.

Defendant sought habeas corpus relief in federal district court, arguing that the failure to reverse the convictions infringed federal constitutional rights. The federal district court agreed, concluding that the erroneous admission of gang-membership evidence, as well as that of the related prosecutorial misconduct, resulted in an unfair trial and a deprivation of defendant's liberty without due process of law. The federal court concluded that the untainted evidence of defendant's guilt was not overwhelming and held that defendant was entitled to be tried anew or released. *Blackmon v Booker,* 312 F Supp 2d 874 (ED Mich, 2004).

The United States Court of Appeals for the Sixth Circuit reversed the district court, determining that defendant had failed to present his federal constitutional claims to the state courts. *Blackmon v Booker*, 394 F3d 399, 400-401 (CA 6, 2004). On remand, the federal district court instructed defendant to exhaust his state-court remedies for the alleged federal-law violations.

In the circuit court, defendant filed a motion for relief from the judgment of conviction, presenting his federal claims that he was deprived of liberty without due process of law and arguing that the trial court's errors were constitutional in nature. The trial court denied the motion. This Court denied defendant's application for leave to appeal. *People v Blackmon,* unpublished order of the Court of Appeals, entered September 15, 2006 (Docket No. 268628).

The Supreme Court, in lieu of granting defendant's application for leave to appeal, remanded the case to this Court. *People v Blackmon*, 477 Mich 1066 (2007), vacated 477 Mich 1125 (2007). The prosecutor filed a motion for reconsideration or clarification of the Supreme Court's order, which the Supreme Court granted, vacating its earlier order and once again remanding the

case to this Court for consideration as on leave granted. 477 Mich 1125 (2007). We now again affirm.

II

The first issue concerns whether the errors that occurred at defendant's trial were constitutional in nature. Defendant argues that some of the errors were constitutional. We disagree.

Whether an error is constitutional in nature is an issue of law. We review issues of law de novo. *People v Kaslowski,* 239 Mich App 320, 323; 608 NW2d 539 (2000).

On direct appeal, this Court held that the following two errors occurred at trial: (1) erroneous admission of gang-affiliation testimony and (2) prosecutorial misconduct. Evidentiary errors are nonconstitutional. *People v Herndon,* 246 Mich App 371, 402 n 71; 633 NW2d 376 (2001). The key issue is whether prosecutorial misconduct is constitutional error. We hold that, in this case, it is not.

Some domestic decisions hold that prosecutorial misconduct is nonconstitutional error, even where the defendant alleges that the misconduct deprived the defendant of a fair trial and resulted in a deprivation of the defendant's liberty without due process of law, see *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003) (improper questioning by the prosecutor is nonconstitutional error); *People v Mezy*, 453 Mich 269, 285-286; 551 NW2d 389 (1996) (plurality opinion of WEAVER, J.) (applying the nonconstitutional harmless-error standard to review a claim of prosecutorial misconduct), while others hold that it constitutes constitutional error, *People v Abraham*, 256 Mich App 265, 272, 276; 662 NW2d 836 (2003) ("Generally, a claim of prosecutorial misconduct is a constitutional issue . . . ."), citing *People v Pfaffle*, 246 Mich App 282,

288; 632 NW2d 162 (2001); but cf. *People v Taylor*, 159 Mich App 468, 471; 406 NW2d 859 (1987) (holding that prosecutorial noncompliance with a discovery order is an error of nonconstitutional magnitude). Thus, domestic decisions do not settle this question. We must look to decisions from federal courts and the courts of other states.

Here, the prosecutorial misconduct consisted of (1) improper elicitation of gang-affiliation testimony, (2) improper argument to the jury concerning defendant's alleged gang affiliation, (3) improper impeachment by the prosecution of one of its own witnesses, Tiffany Goggans, and (4) improperly questioning defendant about the credibility of witnesses. Regarding the first two type of prosecutorial misconduct, defendant cites no authority suggesting that improper elicitation of gang-affiliation testimony, or improper argument to the jury concerning gang affiliation, is an error of constitutional magnitude. Neither do we find any such authority. Therefore, we reject defendant's argument.

Regarding the second two types of prosecutorial misconduct that the earlier panel of this Court found to have occurred, we conclude that these relate only to evidentiary matters. And evidentiary errors are nonconstitutional. *Herndon, supra* at 402 n 71. Therefore, we reject defendant's argument that the second two types of prosecutorial misconduct that occurred at trial were errors of a constitutional nature.

We find no authority for a general constitutional right to exclude gang-affiliation evidence. And none of the errors implicated a specific constitutional right—only the general right to be free from a deprivation of one's liberty without due process of law. (The instant case is not one where the prosecutor violated, for

instance, the Fifth Amendment right against self-incrimination by commenting on defendant's failure to testify, or one where the Sixth Amendment right to counsel was infringed.) The United States Supreme Court made this key distinction, between claims that the prosecutor violated a specific, enumerated constitutional right and claims of violation of the general due-process right to a fair trial. *Donnelly v DeChristoforo*, 416 US 637, 643; 94 S Ct 1868; 40 L Ed 2d 431 (1974). The former types of rights require that courts take special care to ensure that the prosecutor in no way infringes upon the specific constitutional right. *Id*. Although any error can potentially be argued to have deprived a defendant of his due-process fair-trial right, not every trial error is constitutional in nature. *People v Toma,* 462 Mich 281, 296; 613 NW2d 694 (2000) (not every trial error violates due process). Merely framing an issue as constitutional does not make it so. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

Defendant cites United States Supreme Court authority treating prosecutorial misconduct as federal constitutional error. See *Chapman v California,* 386 US 18-20, 25-26; 87 S Ct 824; 17 L Ed 2d 705 (1967) (the prosecutor's comments violated the defendant's Fifth Amendment right against self-incrimination),[6] over-

[6] It is not clear whether *Chapman* still would have held that the error was constitutional absent the involvement of the Fifth Amendment right against self-incrimination. Defendant also cites *Darden v Wainwright*, 477 US 168; 106 S Ct 2464; 91 L Ed 2d 144 (1986) (in evaluating a prosecutorial-misconduct claim, the Court asked whether the conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process; the Court did not indicate whether error was constitutional); *Donnelly, supra* at 640-645 (observing that the respondent's "claims of constitutional error" focused on remarks made by the prosecutor and holding that the errors did not render the respondent's trial so fundamentally unfair as to deny him due process); *Berger v United States*, 295 US 78; 55 S Ct 629; 79

ruled in part on other grounds, as recognized in *Sherley v Kentucky,* 889 SW2d 794 (Ky, 1994). But neither *Chapman* nor the other decisions cited by defendant definitively settle the question at issue here, because none of them stands for the proposition that any prosecutorial misconduct, by itself, is constitutional error. Once again, in *Chapman*, there was a specific constitutional right infringed, not the general constitutional right of due process. Accordingly, we conclude that the errors at issue here are nonconstitutional. *Toma, supra* at 296 (not every trial error violates due process). There is simply no general federal constitutional right to exclusion of gang-membership evidence.

In any event, defendant failed to preserve the errors as constitutional. Although defendant argued in his appellate brief on direct appeal that the prosecutorial misconduct violated his federal and state constitutional due-process rights to a fair trial, his reply brief expressly characterized the errors as nonconstitutional. Thus, defendant waived his argument that this Court should have treated the errors as constitutional. See *People v Williams,* 475 Mich 245, 261; 716 NW2d 208 (2006).

Even if defendant had not waived his argument that the errors were constitutional in nature, we would conclude that they were not constitutional. Where there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law. *Donnelly, supra* at 643.

L Ed 1314 (1935) (holding that a new trial was warranted where prejudice stemming from prosecutorial misconduct was highly probable; Court did not indicate whether error was constitutional). But none of these decisions holds that prosecutorial misconduct is always constitutional error.

In *Donnelly*, a jury of DeChristoforo's peers found him guilty of first-degree murder. DeChristoforo appealed to the Massachusetts Supreme Judicial Court, arguing, among other things, that certain remarks by the prosecutor during closing argument deprived him of his federal constitutional right to a fair trial. *Donnelly, supra* at 638. That court affirmed. It acknowledged that the prosecutor had made improper remarks, but determined that they were not so prejudicial as to require reversal. *Id*. DeChristoforo then sought habeas corpus relief in federal district court, which denied relief, concluding that the prosecutor's arguments were not so prejudicial as to deprive DeChristoforo of his right to a fair trial. The United States Court of Appeals for the First Circuit reversed. "The majority held that the prosecutor's remarks deliberately conveyed the false impression that respondent had unsuccessfully sought to plead to a lesser charge and that this conduct was a denial of due process." *Id*. at 639. The United States Supreme Court reversed the court of appeals, holding that the prosecutor's remarks, considered in the context of the entire trial, were not so prejudicial as to violate DeChristoforo's federal due-process rights. *Id*.

Donnelly does not state an explicit rule for determining when prosecutorial misconduct constitutes constitutional error and when it constitutes nonconstitutional error. But the Court did state:

> This is not a case in which the State has denied a defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel, *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), or in which the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). When specific guarantees of the Bill of

> Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark about respondent's expectations at trial by itself *so infected the trial with unfairness as to make the resulting conviction a denial of due process*. [*Donnelly, supra* at 643 (emphasis added).]

In *Darden v Wainwright*, 477 US 168; 106 S Ct 2464; 91 L Ed 2d 144 (1986), Darden was found guilty by a jury of his peers in Florida state court of murder and other crimes. Under Florida's capital-sentencing statute, the same jury heard further testimony and argument and made a nonbinding recommendation that the death penalty be imposed. The trial judge followed that recommendation, and the Florida Supreme Court affirmed the conviction and the sentence, rejecting the petitioner's contention that the prosecution's closing argument during the guilt phase of the trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the Eighth Amendment. "The prosecution's argument included improper remarks that indicated that petitioner was on weekend furlough from an earlier prison sentence when the crime involved here occurred; implied that the death penalty would be the only guarantee against a future similar act; referred to petitioner as an 'animal'; and reflected an emotional reaction to the case." *Id*. at 169.

Darden sought habeas corpus relief in federal district court, raising the same claim (and one other not relevant here). The district court denied relief, and the United States Court of Appeals for the Eleventh Circuit ultimately affirmed. Before the United States Supreme Court, Darden argued "that the prosecution's closing argument at the guilt-innocence stage of the trial rendered his conviction fundamentally unfair and deprived

the sentencing determination of the reliability that the Eighth Amendment requires." *Darden, supra* at 178-179. The Court sought to place the prosecutor's remarks in context:

> It is helpful as an initial matter to place these remarks in context. Closing argument came at the end of several days of trial. Because of a state procedural rule petitioner's counsel had the opportunity to present the initial summation as well as a rebuttal to the prosecutors' closing arguments. The prosecutors' comments must be evaluated in light of the defense argument that preceded it, which blamed the Polk County Sheriff's Office for a lack of evidence, alluded to the death penalty, characterized the perpetrator of the crimes as an "animal," and contained counsel's personal opinion of the strength of the State's evidence. [*Id*. at 179.]

Next, *Darden* stated:

> The prosecutors then made their closing argument. That argument deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair. Several comments attempted to place some of the blame for the crime on the Division of Corrections, because Darden was on weekend furlough from a prison sentence when the crime occurred. Some comments implied that the death penalty would be the only guarantee against a future similar act. Others incorporated the defense's use of the word "animal." Prosecutor McDaniel made several offensive comments reflecting an emotional reaction to the case. These comments undoubtedly were improper. But as both the District Court and the original panel of the Court of Appeals (whose opinion on this issue still stands) recognized, it "is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright,* 699 F.2d. at 1036. *The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process*." *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Moreover, *the appropri-*

> *ate standard of review for such a claim on writ of habeas corpus is "the narrow one of due process*, and not the broad exercise of supervisory power." *Id.,* at 642, 94 S.Ct., at 1871. [*Id*. at 179-181 (emphasis added).]

The United States Supreme Court affirmed, holding that the prosecutor's improper closing argument did not deprive the defendant of his federal right to a fair trial. Thus, although *Darden* does not expressly make the distinction between prosecutorial misconduct that constitutes constitutional error and misconduct that constitutes nonconstitutional error, it can be read to provide that the former requires that the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a deprivation of liberty without due process of law. *Id*.

In *Burton v Renico*, 391 F3d 764, 780-781 (CA 6, 2004), Burton had been convicted of first-degree murder in a Michigan state court, and his conviction was affirmed by this Court. Burton petitioned for habeas corpus relief in federal district court. The district court denied relief. The United States Court of Appeals for the Sixth Circuit affirmed, holding that this Court's denial of Burton's claim that his Sixth Amendment rights were violated by the trial court's failure to grant his request for a continuance did not warrant habeas corpus relief. The court stated standards for determining whether prosecutorial misconduct causes a deprivation of liberty without due process of law:

> Burton's fifth procedurally defaulted claim is that the prosecutor engaged in misconduct by making statements undermining Burton's presumption of innocence. *Prosecutorial misconduct, in order to rise to the level of a constitutional due process violation, must be so severe that the defendant did not have a fair trial*. As we explained in *Bowling v. Parker,* for prosecutorial misconduct to rise to the level of a constitutional violation cognizable on habeas review:

> "*the misconduct must have so infected the trial with unfairness as to make the resulting conviction a denial of due process. Even if the prosecutor's conduct was improper or even universally condemned, we can provide relief only if the statements were so flagrant as to render the entire trial fundamentally unfair*. Once we find that a statement is improper, four factors are considered in determining whether the impropriety is flagrant: (1) the likelihood that the remarks would mislead the jury or prejudice the accused, (2) whether the remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally presented to the jury, and (4) whether other evidence against the defendant was substantial."
>
> 344 F.3d 487, 512-13 (6th Cir. 2003) (internal quotation marks and citations omitted). [*Id*. (emphasis added).]

Thus, in order to constitute or cause a deprivation of liberty without due process under the federal constitution, the prosecutorial misconduct must be "so flagrant as to render the entire trial fundamentally unfair." *Id*.

In *Marshall v Hendricks*, 307 F3d 36 (CA 3, 2002), Marshall was convicted in a New Jersey state court of hiring someone to murder his wife and was sentenced to death. After exhausting state-court appeals, he petitioned for habeas corpus relief in federal district court, asserting, among other claims, prosecutorial misconduct. The federal district court denied relief. The United States Court of Appeals for the Third Circuit held, in relevant part, that the prosecution's repeated, deliberate misconduct did not render the trial unfair, that the prosecutorial misconduct constituted harmless error, and that prosecutorial misconduct did not violate Marshall's right to call witnesses. The court stated:

> Marshall urges that the New Jersey Supreme Court misapplied the United States Supreme Court's precedent in *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), by determining either that "no error"

occurred, or that any error that did occur was harmless. App. Br. at 134. In *Berger*, the United States Supreme Court condemned the prosecutor's argument as "undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." *Id*. at 85, 55 S.Ct. 629. The Court then enunciated the often-cited standard by which prosecutors must abide:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Id. at 88, 55 S.Ct. 629. But improper conduct is not, in itself, sufficient to constitute constitutional error, even when—as here—that conduct is alleged to be both deliberate and pervasive. Improper conduct only becomes constitutional error when the impact of the misconduct is to distract the trier of fact and thus raise doubts as to the fairness of the trial.[16]

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[16] We note that we only conduct a harmless error inquiry once we decide that constitutional error did occur. Thus, *we first examine whether the misconduct so infected the trial as to render it unfair*. *See, e.g.*, *Darden v. Wainwright*, 477 U.S. 168, 182 n. 15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

[*Id*. at 67 (emphasis added).]

State courts have also acknowledged that, to be constitutional error, prosecutorial misconduct must so

infect the trial with unfairness as to render the trial a deprivation of liberty without due process of law. *People v Ledesma*, 39 Cal 4th 641, 680; 140 P3d 657; 47 Cal Rptr 3d 326 (2006). *Ledesma* states:

> A prosecutor's conduct violates the Constitution only when it is so egregious that it *infects the trial with such unfairness as to make the conviction a denial of due process*. . . . Conduct that does not rise to the level of a constitutional violation will constitute prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [*Id.* at 680-681 (quotation marks and citations omitted; emphasis added).]

See also *People v Jablonski*, 37 Cal 4th 774, 835; 126 P3d 938; 38 Cal Rptr 3d 98 (2006).

Accordingly, in order for prosecutorial misconduct to be constitutional error, the misconduct must have *so infected the trial with unfairness as to make the conviction a deprivation of liberty without due process of law*. *Donnelly, supra* at 643. We conclude that none of the prosecutorial misconduct in this case infected the trial with such unfairness as to make the conviction a denial of due process. All of the prosecutorial misconduct, with the exception of the misconduct consisting of improper argument to the jury concerning defendant's alleged gang affiliation, related to admission of evidence, and such evidentiary errors were supported by specific evidentiary rulings by the trial court.[7] Although we are bound by the prior panel's conclusion that there was prosecutorial misconduct, we conclude that the eviden-

[7] We agree with the prosecutor that "[t]here is nothing improper about a prosecutor's reliance on a state court's evidentiary ruling, *whether or not the ruling itself was correct." Frazier v Huffman*, 343 F3d 780, 792 (CA 6, 2003) (emphasis added).

tiary misconduct did not so infect the trial with unfairness as to deprive defendant of due process.

We also conclude that the misconduct consisting of improper argument to the jury did not so infect the trial with unfairness as to render the conviction a denial of due process. There was evidence that defendant was a member of the Schoolcraft gang and that these crimes (shooting of innocent bystanders) were committed because defendant was coming to the aid of fellow gang member Crost. Crost had visited Keynyatta Simons's girlfriend, Nancy Ellis, who testified that Simons threatened to harm Crost and that Crost made a telephone call asking to be picked up because of some trouble. Hearn testified that defendant arrived, spoke to Crost, and then fired several shots, two of which hit Hearn as he stood near Simons. This evidence suggests (and the jury evidently concluded) that defendant intended to shoot and murder Simons (for threatening to harm Crost), but instead hit the victims. Thus, there was evidence that defendant's crimes were gang-motivated, or at least gang-related. Accordingly, the prosecution's misconduct, consisting of improper argument to the jury regarding defendant's gang affiliation, did not rise to the level of a constitutional violation, because it did not so infect the trial with unfairness as to render the conviction a deprivation of liberty without due process of law.

Accordingly, this Court on direct appeal applied the proper standard of review—the preserved, nonconstitutional error standard. Under the preserved, nonconstitutional error standard, a defendant has the burden of establishing that it is more probable than not that the error in question "undermine[d] the reliability of the verdict," thereby making the error "outcome determinative." *People v Lukity,* 460 Mich 484, 495-496; 596 NW2d 607 (1999).

III

Because the prosecutorial misconduct was nonconstitutional in nature, this Court was not required to apply the "harmless beyond a reasonable doubt" standard on direct appeal. Accordingly, this issue, which the Supreme Court directed us to consider, is moot. *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 61; 744 NW2d 174 (2007).

Next, defendant argues that he has shown good cause and actual prejudice under MCR 6.508(D)(3) for relief from the judgment. Because we find that there was no constitutional error, we reject defendant's arguments in this regard.

IV

The prosecutorial misconduct that occurred in defendant's trial was nonconstitutional error. On direct appeal, this Court did not err in failing to apply the "harmless beyond a reasonable doubt" standard that is applied to preserved federal constitutional error.

Affirmed.

MARKEY, P.J., concurred.

WHITE, J. (*concurring*). I agree with Judge WILDER's legal conclusion that where the violation of a specific constitutional right is not at issue, the standard for determining whether there has been error of a constitutional magnitude in violation of the Due Process Clause is as stated in *Donnelly v DeChristoforo*, 416 US 637, 643; 94 S Ct 1868; 40 L Ed 2d 431 (1974), and *Darden v Wainwright*, 477 US 168; 106 S Ct 2464; 91 L Ed 2d 144 (1986)—"whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process."

A panel of this Court previously found both trial-court error in the admission of evidence and prosecutorial misconduct, but found that because the error did not undermine the reliability of the verdict, the error were harmless. This is a somewhat different inquiry from the question whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Having read the transcript, I conclude that the error did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. The trial was focused on the question whether defendant was guilty of the charged offenses, based on assessment of the credibility of the various witnesses. While the gang evidence was erroneously injected into the trial, my reading of the transcript leads me to conclude that the injection of this issue into the trial did not result in the jury's attention being redirected away from the essential question of guilt based on the evidence to the question of guilt based on association, character, or other extraneous or prejudicial factor. Having so concluded, I agree that the trial was not so unfair as to render the conviction a denial of due process and, thus, the error was not of constitutional magnitude.

CITIZENS PROTECTING MICHIGAN'S CONSTITUTION
v SECRETARY OF STATE

Docket No. 286734. Submitted August 19, 2008, at Lansing. Decided August 20, 2008, at 9:00 a.m. Leave to appeal denied, 482 Mich 960.

Citizens Protecting Michigan's Constitution and others brought an original action in the Court of Appeals against the Secretary of State and the Board of State Canvassers, seeking a writ of mandamus directing the defendants to reject an initiative petition filed by Reform Michigan Government Now! (RMGN). The initiative petition would affect four articles of the constitution, modify 24 current sections of the constitution, and add four new sections to the constitution. RMGN was allowed to intervene in the action as a defendant. The plaintiffs argued that the initiative petition does not meet the requirements of Const 1963, art 12, § 2, for an "amendment" of the constitution by petition and a vote of the electors, and that the petition instead seeks a "revision" of the constitution that, pursuant to Const 1963, art 12, § 3, must be accomplished through a constitutional convention and a vote of the electors.

The Court of Appeals *held*:

1. The Michigan Constitution establishes separate methods for enacting an amendment, as compared to a general revision, of the constitution. The procedure for amending the constitution cannot be used to effectuate a general revision of the constitution. The proposal submitted by RMGN seeks a general revision of the constitution that cannot be accomplished through the initiative petition procedure applicable to amendments. The constitutional power of initiative does not extend to the proposal submitted by RMGN. The defendants have a clear legal duty to reject the petition. An order must be entered directing the defendants to stop the canvass of the petition, reject the petition, and not allow the proposal to be placed on the ballot.

2. Although the Board of State Canvassers had not yet made a determination regarding the sufficiency of the initiative petition, the plaintiffs' complaint does not challenge the sufficiency of the petitions but, rather, seeks a threshold determination regarding whether the changes sought by RMGN may be accomplished

through an amendment of the constitution. Therefore, the claim is ripe for a decision by the Court of Appeals.

3. A court, in order to determine whether a proposal effects a general revision of the constitution, and is therefore not subject to the initiative process established for amending the constitution, must consider both the quantitative nature and the qualitative nature of the proposed changes. The determination depends on not only the number of proposed changes, or whether a wholly new constitution is being offered, but on the scope of the proposed changes and the degree to which those changes would interfere with, or modify, the operation of government. The RMGN proposal clearly falls within the realm of a general revision of the constitution. The power of initiative established by Const 1963, art 12, § 2, does not extend to the RMGN initiative petition.

Relief sought in the complaint for a writ of mandamus granted.

1. CONSTITUTIONAL LAW — AMENDMENTS — GENERAL REVISIONS.

The constitution establishes separate methods for an amendment of and a general revision of the constitution; the provisions are not alternatives and the procedure for amending the constitution cannot be used to effectuate a general revision of the constitution (Const 1963, art 12, §§ 2, 3).

2. CONSTITUTIONAL LAW — AMENDMENTS — GENERAL REVISIONS.

A court must consider both the quantitative nature and the qualitative nature of proposed constitutional changes in order to determine whether a proposal effects a general revision of the constitution and is therefore not subject to the initiative process established for amending the constitution; the determination depends on not only the number of proposed changes, but the scope of the proposed changes and the degree to which those changes would interfere with or modify the operation of government (Const 1963, art 12, §§ 2, 3).

Dickinson Wright PLLC (by *Peter H. Ellsworth, Jeffery V. Stuckey*, and *Scott R. Knapp*) and *Honigman Miller Schwartz and Cohn LLP* (by *John D. Pirich* and *Andrea L. Hansen*) for the plaintiffs.

Michael A. Cox, Attorney General, and *Susan I. Leffler*, *Denise C. Barton*, and *Heather S. Meingast*, Assistant Attorneys General, for the defendants.

Sachs Waldman, P.C. (by *Andrew Nickelhoff*), for Reform Michigan Government Now!

Amicus Curiae:

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Mark G. Sands* and *Joshua S. Smith*, Assistant Attorneys General, for the Attorney General.

Before: SCHUETTE, P.J., and WHITBECK and METER, JJ.

PER CURIAM. Plaintiffs have filed an original action in this Court, seeking a writ of mandamus against defendants Michigan Secretary of State (the Secretary) and the Michigan Board of State Canvassers (the Board). Plaintiffs request a writ directing the Secretary and the Board to reject an initiative petition that intervening defendant Reform Michigan Government Now! (RMGN) has filed. The RMGN initiative petition seeks to place a proposal on the ballot for the November 2008 general election that would modify the Michigan Constitution. We grant the relief sought in the complaint for a writ of mandamus.

I. INTRODUCTION

The issues before this Court concern the interpretation and application of certain provisions of the Michigan Constitution of 1963. The framers of Michigan's Constitution inserted specific provisions, which must be followed, not overlooked, when seeking to modify our state's guiding legal document. As Judge METER observed several years ago:

> The Constitution reigns supreme. It is an immutable, enduring document. Its fundamental integrity cannot be diluted nor tarnished by those who would interpret it in a

> myopic, transient or parochial fashion. The principles enunciated therein will not change unless we the People so decide by prescribed methods. It is also inviolate. There should be no modification to the sacred document we call our Constitution unless there are no less invasive or intrusive means to accomplish needed change. This I call the constitutional doctrine of manifest necessity. [Meter, *An analysis of the unified trial court*, 20 Quinnipiac L R 697, 706 (2001).]

Today our Court reaffirms these principles. Constitutional modification requires strict adherence to the methods and approaches included in the constitution itself. Shortcuts and end runs to revise the constitution, which ignore the pathways specifically set forth by the framers, cannot be tolerated. As Justice MARKMAN said in his concurrence in *Michigan United Conservation Clubs v Secretary of State* (*After Remand*), 464 Mich 359, 393; 630 NW2d 297 (2001) (*MUCC III*), "the 'overarching right of the people' is to have the constitution that they have ratified given respect and accorded its proper meaning."

We offer no opinion on the merits of any or all of the substantive matters contained in the RMGN initiative petition. Also, let us be clear at the outset what our opinion today does *not* do. We do *not* act to prevent the citizens from voting on a proposal simply because that proposal is allegedly too complex or confusing. Nor do we seek to substitute our own preferences regarding governmental form, structure, or functioning for those of the electorate. We do *not*, for example, determine whether reducing the salaries of legislators and certain executive branch officers is a good idea or a bad one. Nor do we decide whether establishing new financial disclosure requirements for elected officials and candidates for public office should be done in the constitution, by statute, or not at all. We do *not* agree or disagree

with the redistricting criteria or process contained in the RMGN proposal. And we most certainly do *not* address the question whether there should be a reduction in judicial salaries and in the number of appellate court judgeships on the ground that these judgeships are "unnecessary." The broad range of public policy issues, and those items that involve politics and elections, are not the province of the judicial branch of government.

RMGN contends that plaintiffs' arguments amount to a "judicial veto," preventing a vote on this massive initiative petition. RMGN misstates the legal issue and ignores specific constitutional requirements, and its argument reflects an appeal to the court of public opinion, not a court of law. Our decision interprets and applies provisions of the constitution of the state of Michigan, nothing less and nothing more.

As we will explain, the Michigan Constitution clearly establishes separate methods for enacting an "amendment" to, as compared to a "general revision" of, the constitution. It is absolutely clear that the procedure for amending the constitution cannot effectuate such a "general revision." Here, RMGN submitted its proposal under the initiative petition procedure that Const 1963, art 12, § 2, established for amending the constitution. However, we conclude that the proposal is a "general revision" of the constitution. Only the constitutional convention procedure established by Const 1963, art 12, § 3, can accomplish such a general revision. Therefore, the constitutional power of initiative does not extend to this proposal. Accordingly, the RMGN initiative petition does not meet the constitutional prerequisites for acceptance and the Board and the Secretary have a clear legal duty to reject the petition. Concurrently with the release of this opinion, we have issued an order direct-

ing the Secretary and the Board to stop the canvass, to reject the RMGN initiative petition, and to not allow the proposal to be placed on the ballot.

II. FACTS AND PROCEDURAL HISTORY

A. THE PARTIES

(1) PLAINTIFFS

Citizens Protecting Michigan's Constitution is a "ballot question committee" organized for the purpose of challenging the RMGN petition. Lowell R. Ulrich is the chief judge of the Chippewa County Probate Court. Michael Bishop and Alan Cropsey are members of the Michigan State Senate. Virgil Smith, Jr., is a member of the Michigan State House of Representatives. Mike Bryanton is the Ingham County Clerk.

(2) DEFENDANTS

The Secretary holds office under the constitution. See Const 1963, art 5, § 3. The Secretary is the single executive, see *id.*, heading the Department of State. The Department of State is one of the principal departments in the executive branch of state government. See MCL 16.104(1). The Secretary is the chief election officer of the state and has supervisory authority over local election officials in the performance of their duties. MCL 168.21.

The Board is established by the constitution and by statute. Const 1963, art 2, § 7; MCL 168.22. It is the Board that canvasses an initiative petition to ascertain if the requisite number of qualified and registered electors has signed the petition and that makes a final determination regarding the sufficiency of a petition. See MCL 168.476.

(3) INTERVENING DEFENDANT

We granted RMGN permission to intervene in this matter. RMGN is a "ballot question committee" that was organized for the purpose of drafting, circulating, collecting signatures for, and submitting for approval the initiative petition that is being challenged here.

(4) AMICUS CURIAE

We granted the Attorney General permission to file a brief as amicus curiae. Although the Attorney General's office represents the Board and the Secretary, the Attorney General asserts that he has an independent obligation as a state officer to protect and defend the constitution.

B. THE RMGN INITIATIVE PETITION

The RMGN initiative petition seeks to alter four articles of the Michigan Constitution of 1963: article 2 (elections), article 4 (legislative branch), article 5 (executive branch), and article 6 (judicial branch). More specifically, as the Attorney General points out, the proposal would, among other things:

> (1) allow voting by absentee ballot without giving a reason;
>
> (2) establish in the executive branch a new office of elections;
>
> (3) modify the referendum procedure;
>
> (4) modify the initiative procedure;
>
> (5) reduce the number of legislators in the state Senate from 38 to 28;
>
> (6) reduce the number of legislators in the state House of Representatives from 110 to 82;

(7) create a new commission with sole and exclusive authority over legislative districting;

(8) establish specific rules for creating legislative districting plans;

(9) eliminate the current provision allowing for judicial review of districting plans;

(10) limit lobbying activities of members of the Legislature who leave office;

(11) reduce the base salaries of legislators, the Governor, the Lieutenant Governor, the Attorney General, and the Secretary;

(12) authorize the Legislature to grant any citizen standing to bring certain environmental lawsuits;

(13) alter the pension and retirement benefits of legislators, certain executive officers, and judges elected after January 1, 2009;

(14) provide for public inspection of financial records of the Legislature;

(15) reduce the maximum number of principal departments in the executive branch;

(16) limit the lobbying activities of heads of principal departments in the executive branch after leaving office;

(17) establish a maximum number of state boards and commissions;

(18) require a separate vote to elect the Governor and the Lieutenant Governor, rather than a single joint vote for the Governor and the Lieutenant Governor candidates nominated by the same party;

(19) eliminate the Governor's authority to fill vacancies in the office of the Secretary and the Attorney General;

(20) require financial disclosures by certain elected officials (including judges and legislators) and candidates for those positions;

(21) reduce the number of Supreme Court justices from seven to five;

(22) require the Supreme Court to issue rules for the public inspection of documents and records relating to the administration of the courts;

(23) reduce the number of Court of Appeals judges to 21;

(24) reduce the number of Court of Appeals districts to three;

(25) eliminate the Legislature's authority to increase the number of Court of Appeals judges and change the districts from which they are elected;

(26) add 10 circuit court judgeships;

(27) reduce judicial salaries by 15 percent;

(28) require the Legislature to implement certain requirements regarding jury lists; and

(29) replace the Judicial Tenure Commission with a judicial performance commission, composed primarily of nonlawyer citizens.

C. THE FILING OF THE RMGN INITIATIVE PETITION

RMGN filed its initiative petition with the Secretary on July 7, 2008. The Secretary subsequently notified the Board, and the Board has since begun its canvass of the petition. In a letter of July 23, 2008, to plaintiffs' counsel, the Secretary expressed an intention "to proceed with the actions necessary to place this proposal on the ballot provided the requisite number of valid signatures have been submitted."

D. THE COMPLAINT FOR A WRIT OF MANDAMUS

On July 24, 2008, plaintiffs filed their complaint for a writ of mandamus in this Court. Plaintiffs claim that the RMGN initiative petition is not eligible to be placed on the ballot because it is not merely an "amendment" to the constitution, but is a "general revision" of the constitution that only a constitutional convention can

accomplish. Plaintiffs further claim that the RMGN initiative petition is not eligible to be placed on the ballot because it offers more than a single amendment with a single purpose.

III. ANALYSIS

A. JURISDICTION

This Court has original jurisdiction to entertain an action for "mandamus against a state officer." MCR 7.203(C)(2), citing MCL 600.4401. The Secretary and the Board are "state officers" for purposes of mandamus. See, e.g., *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 491; 688 NW2d 538 (2004). Therefore, this case is within our jurisdiction.

B. "RIPENESS"

RMGN argues that this case is not properly before the Court because the Board has not yet made its sufficiency determination regarding the initiative petition. Although RMGN phrases the argument in terms of jurisdiction, we do not consider this a jurisdictional issue, but a "ripeness" issue. A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all. *Huntington Woods v Detroit*, 279 Mich App 603, 615-616; ___ NW2d ___ (2008). RMGN essentially argues that because its initiative petition is currently before the Board, there remains the possibility that the Board will deem the initiative petition insufficient and the submission of the proposal on the ballot may not occur. However, we hold that this case is indeed "ripe" for a decision by this Court.

In *Michigan United Conservation Clubs v Secretary of State* (*On Remand*), 246 Mich App 82; 630 NW2d 379 (2001) (*MUCC II*), rev'd 464 Mich 359 (2001), the plain-

tiffs sought a writ of mandamus ordering the Secretary and the Board to reject a petition for a referendum. This Court, by order, initially denied mandamus on the ground that the issue was not ripe because the Board had not completed its canvass. However, the Supreme Court in lieu of granting leave to appeal, vacated our order and remanded the case for plenary consideration. In so doing, the Supreme Court stated:

> The issue in this case is whether the referendum sought is with respect to a law "making appropriations for state institutions or to meet deficiencies in state funds." Const 1963, art 2, § 9. This controversy is ripe for review because it is not dependent upon the Board of Canvassers' counting or consideration of the petitions but rather involves a threshold determination whether the petitions on their face meet the constitutional prerequisites for acceptance. All of the information necessary to resolve this controversy, i.e., whether 2000 PA 381 constitutes a law which is excepted from the referendum process under Const 1963, art 2, § 9, is presently available. [*Michigan United Conservation Clubs v Secretary of State*, 463 Mich 1009 (2001) (*MUCC I*) (internal citations omitted).]

Here, plaintiffs are arguing that, for reasons *other than the sufficiency of the RMGN initiative petition*, the proposal is not eligible to be placed on the ballot. Essentially, plaintiffs contend that this case involves a "threshold determination" that is ripe for our consideration because its resolution is not dependent on any determination by the Board. We agree and conclude that the doctrine of ripeness does not preclude our resolution of plaintiffs' claims.

C. MANDAMUS

(1) REQUIREMENTS FOR MANDAMUS

Mandamus is the appropriate remedy for a party seeking to compel action by election officials. See, e.g.,

Wolverine Golf Club v Secretary of State, 24 Mich App 711; 180 NW2d 820 (1970), aff'd 384 Mich 461 (1971); *Automobile Club of Michigan Comm for Lower Rates Now v Secretary of State* (*On Remand*), 195 Mich App 613; 491 NW2d 269 (1992). That said, a writ of mandamus is an extraordinary remedy and will only be issued where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. *Tuggle v Dep't of State Police*, 269 Mich App 657, 668; 712 NW2d 750 (2005); *Genesis Ctr, PLC v Comm'r of Financial & Ins Services*, 246 Mich App 531, 546; 633 NW2d 834 (2001). We also note that, under MCR 7.216(A)(7), this Court can, in our discretion and on terms we deem just, "enter any judgment or order and grant further or different relief as the case may require."

(2) POSITIONS OF THE PARTIES

The Secretary, the Board, and RMGN argue that plaintiffs have failed to establish the necessary prerequisites for granting mandamus. In particular, they argue that determining whether a proposal is an "amendment" to, or a "general revision" of, the constitution, or whether a proposal has more than a single purpose, is beyond the scope of the authority of the Secretary and the Board. Therefore, they argue, plaintiffs cannot establish that the Secretary and the Board have a clear legal duty to preclude submission of the RMGN proposal to the electors. They go on to argue that even if such duties exist, the exercise of those duties would not be a ministerial task.

Plaintiffs argue to the contrary. According to plaintiffs, the Board and the Secretary do indeed have a clear legal duty to make the "threshold determination" of whether the proposal is eligible to be placed on the ballot. Plaintiffs then note that the Secretary, in her July 23, 2008, letter, and on the basis of her belief that it is not her job to do so, has expressly declined to address the threshold ballot-eligibility questions that plaintiffs raise. They assert that if the RMGN proposal is not "ballot eligible," the proper, indeed the only, remedy is a writ of mandamus.

The Attorney General argues that the RMGN initiative petition is a revision of the constitution, and therefore not the proper subject of an initiative petition, but he does not specifically take a position on whether mandamus should issue.

(3) EXISTENCE OF A CLEAR LEGAL DUTY

This Court has previously held that the Board's duties with regard to a proposed constitutional amendment are "limited to determining whether the form of the petition substantially complies with the statutory requirements and whether there are sufficient signatures to warrant certification of the proposal." *Citizens for Protection of Marriage*, *supra* at 492; see also MCL 168.476 and MCL 168.482. The Board has no authority to consider the lawfulness of a proposal. *Citizens for Protection of Marriage*, *supra* at 493. The Board must complete its canvass and make the official declaration of the sufficiency or insufficiency of the petition "at least 2 months before the election" at which the proposal is to be submitted. MCL 168.476(2); MCL 168.477(1). The Board also has the responsibility to approve the proposal's statement of purpose, which the Director of Elec-

tions creates and which is not to exceed 100 words. MCL 168.474; MCL 168.22e; see also *Citizens for Protection of Marriage*, *supra* at 494.

The Secretary's duties in regard to an initiative petition are also limited. Upon the filing of a signed petition, the Secretary must "immediately" notify the Board by first-class mail. MCL 168.475(1). The Secretary has no further duties until after the Board deems a petition sufficient and approves the Director of Elections' statement of purpose. Once the Board approves the statement of purpose, the Secretary must send copies of the statement of purpose to newspapers to give "as wide publicity as possible . . . ." MCL 168.477(1). In addition, the Secretary must "[p]repare the form of ballot for any proposed amendment to the constitution or proposal under the initiative or referendum provision of the constitution to be submitted to the voters of this state." MCL 168.31(1)(f). The Secretary then provides the form, along with copies of the proposed amendment of the constitution, to the county clerks. MCL 168.480.

On their face, these duties of the Board and the Secretary may not include making a "threshold determination" whether a ballot proposal is an "amendment" to, as opposed to a "general revision" of, the constitution or whether the ballot proposal contains more than one purpose. Further, an act is ministerial if it is " ' "prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment." ' " *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 439; 722 NW2d 243 (2006) (citations omitted). We agree with the Secretary, the Board, and RMGN that determining whether a ballot proposal is an "amendment" to, or a "general revision" of, the constitution and determining

whether a ballot proposal serves more than one purpose involve, at a minimum, the exercise of judgment. But even assuming that the duties plaintiffs ascribe to the Board and the Secretary do not exist or, even if they do exist, that they are not "ministerial" in nature, we conclude that the Board and the Secretary have a clear legal duty that this Court can enforce in this particular case.

The entire history of the *Michigan United Conservation Clubs* case best illustrates the clear legal duty at issue here. As we mentioned earlier, this Court initially denied mandamus on the ground that the issue was not "ripe" because the Board had not completed its canvass. The Supreme Court remanded the case for plenary consideration, stating that "[a]ll of the information necessary to resolve this controversy, i.e., whether 2000 PA 381 constitutes a law which is excepted from the referendum process under Const 1963, art 2, § 9, is presently available." *MUCC I*, *supra* at 1009. On remand, this Court denied the request for a writ of mandamus, concluding that 2000 PA 381 was indeed subject to the referendum process. See *MUCC II*, *supra* at 84, 93. On appeal after this Court's decision on remand, the Supreme Court reversed, holding:

> The issue here is whether 2000 Public Act 381 is exempt from the power of referendum of the Michigan Constitution. Having granted leave to appeal and heard oral argument, this Court finds as follows:
>
> (1) The power of referendum of the Michigan Constitution "does not extend to acts making appropriations for state institutions . . . ." Const 1963, art 2, § 9.
>
> (2) 2000 PA 381 states that "one million dollars is appropriated from the general fund to the department of state police . . . ." MCL 28.425w(1).

(3) An appropriation of $1,000,000 is an "appropriation," and the Department of State Police is a "state institution."

(4) Therefore, the power of referendum of the Michigan Constitution does not extend to 2000 PA 381.

Accordingly, consistent with Const 1963, art 2, § 9 and an unbroken line of decisions of this Court interpreting that provision, the Court of Appeals is reversed, and the relief sought in the complaint for mandamus is granted. The May 21, 2001 declaration by the Board of State Canvassers of the sufficiency of the petition for referendum on 2000 PA 381 is vacated and defendant Secretary of State and the Board of State Canvassers are directed that 2000 PA 381 is not subject to referendum for the reasons set forth herein. [*MUCC III*, *supra* at 365-366.]

Michigan United Conservation Clubs clearly establishes that challenges of the type made by plaintiffs in this case may be raised in a mandamus action against the Board and the Secretary *before* the Board's sufficiency determination.

The Secretary further contends that neither she nor the Board has a clear legal duty to conduct a substantive review of the RMGN initiative petition to determine its constitutional sufficiency. And, indeed, plaintiffs concede that it is well settled that a substantive analysis of the RMGN initiative petition is premature. In *Hamilton v Secretary of State*, 212 Mich 31, 34-35; 179 NW 553 (1920), the Michigan Supreme Court established that substantive constitutional challenges to the validity of a ballot proposal are premature when made before the voters adopt the proposition in question.[1] However, our Supreme Court has since made a

[1] See *Fontana v Lindholm*, 276 Mich 361, 363; 267 NW 860 (1936) (stating that in *Hamilton* the Court held that "where a proposed amendment to the State Constitution was proper in form and contained

distinction between substantive challenges and questions related to whether the proposition is constitutionally eligible to be presented before the voters.

In a subsequent case, *Leininger v Secretary of State*, 316 Mich 644, 654-656; 26 NW2d 348 (1947), the Court carved out an exception to the *Hamilton* rule, holding that a constitutionally fatal defect in an initiative petition supported the issuance of a writ of mandamus prohibiting the Secretary of State from transmitting the proposed law. The *Leininger* Court explained that, unlike in *Hamilton*, "[i]n the case at bar . . . we are not concerned with the question of whether the substance of the proposed law is violative of the Federal or State Constitutions. Here the question is whether the petition, in form, meets the constitutional requirements so as to qualify it for transmittal to the legislature and submission to the people." *Id*. at 651. On this point, the words of Chief Justice OSTRANDER in *Scott v Secretary of State*, 202 Mich 629, 643; 168 NW 709 (1918), are most instructive:

> Of the right of qualified voters of the State to propose amendments to the Constitution by petition it may be said, generally, that it can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises. *But the right is to be exercised in a certain way and according to certain conditions, the limitations upon its exercise, like the reservation of the right itself, being found in the Constitution*. [Emphasis added.]

This is exactly what is involved here. The inquiry here involves the "threshold determination" whether the RMGN initiative petition meets the constitutional pre-

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the required number of signatures, it was the duty of the secretary of State to place it upon the ballot, that he may not question the constitutionality of said amendment, and that under such circumstances his duties were ministerial and not judicial").

requisites for placement on the ballot. This is not an instance of "judicial veto" that Justice SHARPE admonished against in *Hamilton*, *supra* at 38 (SHARPE, J., concurring).

City of Jackson v Comm'r of Revenue, 316 Mich 694; 26 NW2d 569 (1947), is also directly relevant. In that case, the plaintiffs, by way of mandamus, sought to compel the defendants to comply with an amendment of the constitution that the voters had approved in a general election. The amendment reached the ballot for the general election through an initiative petition. At one point, the Supreme Court stated:

> Defendants also claim that the amendment is void because it contains proposals for more than one purpose; and that it is an ineffectual attempt to revise the Constitution. The claims are without merit. We have carefully considered all of the objections raised as to the legality of the petitions and the manner in which this amendment has been submitted to the people. We find no defects in the petitions or in the manner of submitting the proposed amendment, to such extent that the amendment must now be declared a nullity. In that regard we are not unmindful of the fact that to now declare the amendment a nullity would thwart the expressed will of the voters. *We also are conscious of the fact that these objections might have been raised in advance of the submission, as was done in* Leininger v. Secretary of State [316 Mich 644; 26 NW2d 348 (1947)]. *In that case we found that the initiative petition was fatally defective*[2] *and directed the secretary of State, the State board of canvassers and the attorney general to refrain from submitting the proposal to the voters.* [*Id*. at 711 (emphasis added).]

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[2] The "fatal defect" in *Leininger* was that the initiative petition was not in the proper "form"; in particular, the petition did "not contain the title of the proposed measure" as required by the constitution. *Leininger, supra* at 654.

The cases establish that a "threshold determination" of whether the RMGN initiative petition meets the constitutional prerequisites for acceptance is now ripe for a decision by this Court. Further, the cases establish that a petition will not meet the constitutional prerequisites for acceptance if the constitutional power of initiative does not extend to the proposal at issue. And, finally, the cases establish that if we determine that the RMGN initiative petition is not subject to the constitutional power of initiative, we may grant mandamus and direct the Board and the Secretary to reject the RMGN initiative petition.

Thus, assuming the Board and the Secretary have no clear legal duty to determine whether the RMGN initiative petition is an "amendment" to, or a "general revision" of, the constitution, or a duty to determine whether the RMGN initiative petition serves more than one purpose, then *this Court* must make the "threshold determination" that the RMGN initiative petition does not meet the constitutional prerequisites for acceptance. And, *at that point*, the Board and the Secretary have a clear legal duty to reject the RMGN petition. In other words, in this case, our order would not enforce any duty on the part of the Board and the Secretary to make the "threshold determination" whether the RMGN initiative petition is an "amendment" or a "general revision," or whether it serves more than one purpose. Rather, our order would enforce a duty on the part of the Board and the Secretary to reject the RMGN initiative petition in light of *our* "threshold determination" that it does not meet the constitutional prerequisites for acceptance. As noted earlier, we have the power under MCR 7.216(A)(7), in our discretion and on terms we deem just, to "enter any judgment or order or grant further or different relief as the case may require." And the subsequent act of the Secretary and the Board in

rejecting the RMGN initiative petition in light of our "threshold determination" would be ministerial in nature because it would not require the exercise of judgment or discretion.

D. THRESHOLD DETERMINATIONS

(1) "AMENDMENT" VERSUS "GENERAL REVISION"

(a) CONSTITUTIONAL PROVISIONS

Const 1963, art 12, § 2, which pertains to amendment by petition and vote of electors, provides:

> Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.
>
> Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law. Copies of such publication shall be posted in each polling place and furnished to news media as provided by law.

> The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.
>
> If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part of the constitution, and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved. If two or more amendments approved by the electors at the same election conflict, that amendment receiving the highest affirmative vote shall prevail.

In contrast, Const 1963, art 12, § 3, which pertains to general revision of the constitution, provides:

> At the general election to be held in the year 1978, and in each 16th year thereafter and at such times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors of the state. If a majority of the electors voting on the question decide in favor of a convention for such purpose, at an election to be held not later than six months after the proposal was certified as approved, the electors of each representative district as then organized shall elect one delegate and the electors of each senatorial district as then organized shall elect one delegate at a partisan election. The delegates so elected shall convene at the seat of government on the first Tuesday in October next succeeding such election or at an earlier date if provided by law.
>
> The convention shall choose its own officers, determine the rules of its proceedings and judge the qualifications, elections and returns of its members. To fill a vacancy in the office of any delegate, the governor shall appoint a qualified resident of the same district who shall be a member of the same party as the delegate vacating the office. The convention shall have power to appoint such

> officers, employees and assistants as it deems necessary and to fix their compensation; to provide for the printing and distribution of its documents, journals and proceedings; to explain and disseminate information about the proposed constitution and to complete the business of the convention in an orderly manner. Each delegate shall receive for his services compensation provided by law.
>
> No proposed constitution or amendment adopted by such convention shall be submitted to the electors for approval as hereinafter provided unless by the assent of a majority of all the delegates elected to and serving in the convention, with the names and vote of those voting entered in the journal. Any proposed constitution or amendments adopted by such convention shall be submitted to the qualified electors in the manner and at the time provided by such convention not less than 90 days after final adjournment of the convention. Upon the approval of such constitution or amendments by a majority of the qualified electors voting thereon the constitution or amendments shall take effect as provided by the convention.

(b) INTERPRETING THE CONSTITUTIONAL PROVISIONS

The difference in procedure established "for amendments and for revision undoubtedly was purposely made and cannot be ignored." *People v Bd of State Canvassers*, 323 Mich 523, 528; 35 NW2d 669 (1949) (interpreting Const 1908, art 17, §§ 1 and 4). Therefore, whether RMGN's initiative petition proposes an "amendment" or a "general revision" is of central significance: only a constitutional convention can make a "general revision" of the constitution. Stated differently, to allow the constitutional power of initiative to extend to a "general revision" of the constitution would be to ignore the framers' intentional differentiation in terms and procedure. Consequently, determining whether the RMGN proposal is an "amendment" to, or a "general revision" of, the constitution is of primary importance.

In this regard, we note that counsel for RMGN took the position at oral argument that the initiative procedure under Const 1963, art 12, § 2, would encompass an amendment, or series of amendments, that would result in a wholly new constitution. This position of necessity means that the initiative procedure under Const 1963, art 12, § 2, is an *alternative* to the constitutional convention procedure in Const 1963, art 12, § 3. In practical effect, therefore, Const 1963, art 12, § 3, would become superfluous. See *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 70; 748 NW2d 524 (2008) (stating that an interpretation that renders language meaningless must be avoided). We do not, therefore, consider Const 1963, art 12, § 2, and Const 1963, art 12, § 3, to be alternative provisions. Rather, they set out separate procedures for "amendments" as contrasted to "general revisions."

Further, we typically discern the common understanding of constitutional text "by applying each term's plain meaning at the time of ratification." *Nat'l Pride at Work, Inc*, *supra* at 67-68. We may discern the "plain meaning" by reference to a dictionary. See, e.g., *id*. at 69.

Webster's Third New International Dictionary (1965), p 68, defines an "amendment" as "the process of amending (as a motion, bill, act, or constitution)." To "amend" means "to alter (as a motion, bill, or law) formally by modification, deletion, or addition <[amend] the constitution>." *Id*. A "revision" is "an act of revising." *Id*. at 1944. To "revise" means "to make a new, amended, improved, or up-to-date version." *Id*. While somewhat helpful to the analysis, the dictionary definitions of "amendment" and "revision" do not completely reveal the differentiation that was intended by the framers of the constitution from their use of the words "amendment" and "revision."

However, decisions of our Supreme Court provide some clarity. For example, in *Kelly v Laing*, 259 Mich 212, 217-218; 242 NW 891 (1932), our Supreme Court considered the difference between a "revision" and an "amendment" in the context of a city charter. The question posed was "whether the changes of the nature here proposed may be made by amendment to the charter or only by revision." *Id*. at 216. The distinction was of import because there were different statutory methods for amending the charter and for revising the charter. *Id*. at 216-217. The Supreme Court delineated the differences between an amendment and a revision, stating:

> "Revision" and "amendment" have the common characteristics of working changes in the charter and are sometimes used inexactly, but there is an essential difference between them. Revision implies a re-examination of the whole law and a redraft without obligation to maintain the form, scheme, or structure of the old. As applied to fundamental law, such as a constitution or charter, it suggests a convention to examine the whole subject and to prepare and submit a new instrument, whether the desired changes from the old be few or many. Amendment implies continuance of the general plan and purport of the law, with corrections to accomplish its purpose. Basically, revision suggests fundamental change, while amendment is a correction of detail. [*Id*. at 217.]

The Supreme Court went on to state:

> It is a specific instrument, the charter, as to which the change must be "within the lines" in order to constitute an amendment, not the general "subject of municipal government" or "local self-government." The latter, however, is a proper and principal consideration on revision.
>
> There is reason in the distinction made by the legislature. An amendment is usually proposed by persons interested in a specific change and little concerned with its effect upon other provisions of the charter. The machinery

> of revision is in line with our historical and traditional system of changing fundamental law by convention, which experience has shown best adapted to make necessary readjustments.
>
> From the express implication arising from an advisory vote in proceedings for revision, from the difference in method providing for difference in character of changes, and from the proper meaning of the words used, we are of the opinion that the statute must be construed to require that a change in the form of government of a home-rule city may be made only by revision of the charter. [*Id*. at 221-222.]

Although *Laing* specifically interpreted statutes and a city charter, not the constitution, we find the decision to be of significant relevance here, primarily in that *Laing* stands for the proposition that there is a *qualitative* aspect to the meanings of the words "amendment" and "revision" when used to describe changes to "fundamental law" such as the constitution. In particular, differentiating between an amendment and a revision requires consideration of the substance and the effect of the proposed changes.

Pontiac School Dist v City of Pontiac, 262 Mich 338; 247 NW 474 (1933), supports this conclusion. In that case, the Michigan Supreme Court considered a challenge to an amendment of the constitution approved in the November 1932 general election. The amendment, which had been initiated by a petition of qualified electors, limited property tax assessments and purportedly altered or abrogated "some 16 or 18 other provisions of the Constitution . . . ." *Id*. at 343. The plaintiff's challenge in *Pontiac School Dist* included an argument similar to the challenge that plaintiffs make here. In addressing the argument, the Supreme Court stated:

> The validity of the 1932 amendment is further challenged on the ground that it is not an amendment, but instead it is so far reaching in its modification and restriction of governmental powers that it amounts to a revision of the State Constitution, and, not having been accomplished in the manner provided in the Constitution for revision (article 17, § 4), it is wholly ineffective and invalid. We are fully convinced that the adoption of this new limitation upon the power of taxation, under the construction hereinafter placed upon it, does not so interfere with or modify the operation of governmental agencies as to render it other than an amendment by way of an addition to the Constitution. As an amendment it was legally adopted and became a part of our fundamental law. [*Id*. at 345.]

In *Laing* and *Pontiac School Dist*, our Supreme Court established the proper analysis for determining whether a proposal is a "general revision" of, or merely an "amendment" to, the constitution: the analysis should consider not only the *quantitative* nature of the proposed modification, but also the *qualitative* nature of the proposed modification. More specifically, the analysis does not turn solely on whether the proposal offers a wholly new constitution, but must take into account the degree to which the proposal interferes with, or modifies, the operation of government. The clear implication is that the greater the degree of interference with, or modification of, government, the more likely the proposal amounts to a "general revision."[3] Such a quantitative and qualitative analysis of

[3] There are some distinctions between *Pontiac School Dist* and the case here. Primarily, *Pontiac School Dist* was decided under the Michigan Constitution of 1908 and considered the issue of the propriety of the amendment *after* the amendment was approved in the general election. However, these distinctions are of no significant legal consequence. First, the 1908 Michigan Constitution is similar to the 1963 Michigan Constitution in that it also established separate methods for enacting "amendments" to, and a "general revision" of, the constitution. See Const 1908, art 17,

proposed changes is consistent with the analysis other states have used when considering the distinction between an "amendment" and a "revision" for purposes of modifying a state constitution.

(c) OUT-OF-STATE DECISIONS

The primary out-of-state case that plaintiffs, RMGN, and the Attorney General discuss is *McFadden v Jordan*, 32 Cal 2d 330; 196 P2d 787 (1948). In *McFadden*, the petitioner sought a writ of mandamus against California's secretary of state directing him not to place an initiative proposal, titled the "California Bill of Rights,"[4] on the ballot. The issue before the California Supreme Court was whether the proposal was an attempted "revision" of the constitution, rather than an "amendment" to the constitution. This issue was critical because the California Constitution, as does our constitution, provides separate methods for its revision and its amendment. *Id*. at 332-334.

The *McFadden* court noted that in *Livermore v Waite*, 102 Cal 113; 36 P 424 (1894), the court had previously held that the establishment of a specific procedure for revising the constitution (by way of constitutional convention) precluded the idea that the framers of the constitu-

§§ 1, 2, and 4. Second, the fact that the voters had already approved the amendment in the general election did not affect the Supreme Court's analysis in *Pontiac School Dist*. As a result, our reliance on *Pontiac School Dist* is appropriate.

[4] As the Attorney General notes in his brief as amicus curiae, the measure purported to add only one new article to the California Constitution, but contained 12 separate sections, 208 subsections, and more than 21,000 words. *McFadden, supra* at 334. In contrast, the California Constitution at the time contained 25 articles, composed of 347 sections and 55,000 words. *Id.* Moreover, the measure contained a clause making it controlling over any conflicting provision in the existing California Constitution. *Id.* at 346.

tion intended to afford a means of effecting a revision by way of the procedure established for amending the constitution (legislative proposal). At one point, the court stated:

> "The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." [*McFadden*, *supra* at 333, quoting *Livermore*, *supra* at 118-119.]

The *McFadden* court then went on to state:

> It is thus clear that a revision of the Constitution may be accomplished only through ratification by the people of a revised constitution proposed by a convention called for that purpose as outlined hereinabove. Consequently if the scope of the proposed initiative measure (hereinafter termed "the measure") now before us is so broad that if such measure became law a substantial revision of our present state Constitution would be effected, then the measure may not properly be submitted to the electorate until and unless it is first agreed upon by a constitutional convention, and the writ sought by petitioner should issue. [*McFadden, supra* at 334.]

In determining whether the measure at issue was a revision or an amendment, the *McFadden* court summarized the content of the measure, stating:

> To recapitulate, at least 15 of the 25 articles contained in our present Constitution would be either repealed in their entirety or substantially altered by the measure, a minimum of four (five, if the civic center provision be deemed new) new topics would be treated, and the func-

> tions of both the legislative and judicial branches of our state government would be substantially curtailed. [*Id*. at 345.]

The court then stated:

> Our review of the subjects covered by the measure and of its effect on the totality of our plan of government as now constituted does not purport to be exhaustive. It is amply sufficient, however, to demonstrate the wide and diverse range of subject matters proposed to be voted upon, and the revisional effect which it would necessarily have on our basic plan of government. The proposal is offered as a *single amendment* but it obviously is multifarious. It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all. Such an appeal might well be proper in voting on a *revised* constitution, proposed under the safeguards provided for such a procedure, but it goes beyond the legitimate scope of a single amendatory article. [*Id*. at 345-346 (emphasis in original).]

The court specifically rejected the intervenors' argument that "if any less than all sections of the Constitution are altered, and if any less than all old sections are discarded, the change is merely an amendment." *Id*. at 347. The court stated:

> We cannot accept such an arbitrary and strained minimization of [the] difference between *amend* and *revise*. The differentiation required is not merely between two words; more accurately it is between two procedures and between their respective fields of application. Each procedure, if we follow elementary principles of statutory construction, must be understood to have a substantial field of applica-

> tion, not to be (as argued in intervenors' Answering Memorandum) a mere alternative procedure in the same field. Each of the two words, then, must be understood to denote, respectively, not only a procedure but also a field of application appropriate to its procedure. The people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision. . . . Intervenors' contention—that any change less than a total one is but amendatory—would reduce to the rubble of absurdity the bulwark so carefully erected and preserved. Each situation involving the question of amendment, as contrasted with revision, of the Constitution must, we think, be resolved upon its own facts. A case might, conceivably, be presented where the question would be close and where there would be occasion to undertake to define with nicety the line of demarcation; but we have no such case or occasion here. [*Id*. at 347-348 (emphasis in original).]

The *McFadden* court ultimately concluded:

> Applying the long established law to any tenable view of the facts which have been related, it is overwhelmingly certain that the measure now before us would constitute a revision of the Constitution rather than an amendment or "such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purposes for which it was framed." Indeed, as has been shown in some detail, the effect of adoption of the measure proposed, rather than to "within the lines of the original instrument" constitute "an improvement or better carry out the purpose for which it was framed," would be to substantially alter the purpose and to attain objectives clearly beyond the lines of the Constitution as now cast. [*Id*. at 349-350 (citations omitted.]

After *McFadden*, California courts adopted a two-pronged test, consisting of both a qualitative and a

quantitative element, to determine whether a ballot initiative constituted an "amendment" versus a "revision" of the constitution. In *Raven v Deukmejian*, 52 Cal 3d 336, 342-343, 350-351; 801 P2d 1077; 276 Cal Rptr 326 (1990), the ballot initiative at issue sought to limit the rights of criminal defendants by mandating that California courts could not offer greater protections than those offered by the United States Supreme Court's interpretation of the federal constitution.

The initiative passed the quantitative prong of the test because it did not delete any of the language in the California Constitution and affected only a single article. *Id*. at 351. However, the court held that the initiative failed the qualitative prong of the test and constituted a revision because it sought far-reaching changes to the structure of the California judiciary by transferring its interpretive power concerning criminal defendants to the United States Supreme Court. *Id*. at 352-353. The court reasoned that the ballot initiative "substantially alter[ed] the substance and integrity of the state Constitution . . . ." *Id*. at 352. Therefore, it was not proper subject matter for a ballot proposal. See also *Brosnahan v Brown*, 32 Cal 3d 236, 259-261; 651 P2d 274; 186 Cal Rptr 30 (1982) (examining both the quantitative and qualitative effects of a proposal to determine if it constituted an "amendment" to or "revision" of the California Constitution).

Moreover, *McFadden* and its California progeny have formed the basis for the decisions of several other states that have considered the "revision" versus "amendment" issue in the context of modifying a state constitution. For example, in *Bess v Ulmer*, 985 P2d 979, 987 (Alas, 1999), the Supreme Court of Alaska stated that it "must consider both the quantity and quality of the proposed constitutional changes" and that the "core

determination is always the same: whether the changes are so significant as to create a need to consider the constitution as an organic whole." The Supreme Court of Alaska relied, in part, on decisions of the California Supreme Court, which held that

> an enactment which is so extensive in its provisions as to change directly the "substantial entirety" of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof. However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also. [*Amador Valley Joint Union High School Dist v State Bd of Equalization*, 22 Cal 3d 208, 223; 583 P2d 1281; 149 Cal Rptr 239 (1978).]

Likewise, in *Opinion of the Justices*, 264 A2d 342, 346 (Del, 1970), the Supreme Court of Delaware considered an "amendment" to be " 'an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed' " and a "revision" to make "extensive alterations in the basic plan and substance of the existing document" and attain "objectives and purposes beyond the lines of the present Constitution." (Citations omitted.) See also *Martinez v Kulongoski*, 220 Or App 142, 149-150; 185 P3d 498 (2008) (holding that "the distinction between a 'revision' and an 'amendment' " "can properly involve quantitative and qualitative considerations" and that changes can be "so 'fundamental' and 'far reaching' as to effect a 'revision' ") (citation omitted). The upshot of *McFadden* and these out-of-state decisions is that the distinction between a revision and an amendment depends on both the quantitative *and* the qualitative nature of the proposed changes to a constitution.

We agree with the reasoning of these decisions and find them to be consistent with Michigan law as stated

in *Laing* and *Pontiac School Dist.* Consequently, we hold that in order to determine whether a proposal effects a "general revision" of the constitution, and is therefore not subject to the initiative process established for amending the constitution, the Court must consider both the quantitative nature and the qualitative nature of the proposed changes. More specifically, the determination depends on not only the number of proposed changes, or whether a wholly new constitution is being offered, but on the scope of the proposed changes and the degree to which those changes would interfere with, or modify, the operation of government.

(d) APPLICATION

We recognize that it is not possible to "define with nicety the line of demarcation" between an "amendment" and a "general revision." *McFadden, supra* at 348. But, as in *McFadden*, "we have no such case or occasion here" that requires us to do so. *Id*. After evaluating the quantitative and the qualitative nature of the changes the RMGN initiative petition proposes, we hold that the proposal does not even approach the "field of application" for the amendment procedure. *Id*. at 347. Instead, the proposal plainly falls within the realm of a "general revision" of the constitution.

In particular, the RMGN initiative petition modifies §§ 1, 4, 7, and 9 of article 2; §§ 2, 3, 4, 5, 6, 7, 10, 12, 17, and 52 of article 4; §§ 2, 3, and 21 of article 5; and §§ 2, 3, 8, 11, 18, 19, and 30 of article 6, and would add §§ 55 and 56 to article 4, § 31 to article 5, and § 31 to article 6.

Looked at quantitatively, the proposal affects four articles of the constitution, modifies 24 current sections of the constitution, and adds four new sections to the constitution. Clearly, the number of proposed changes

and the proportion of current articles and sections affected by those proposed changes are very significant.

From a qualitative standpoint, the scope of the proposed changes is expansive. In the words of *McFadden*, the proposal "obviously is multifarious." *McFadden*, *supra* at 346. The proposal touches on a wide and diverse range of subjects, from the number of executive departments, legislators, and judges to absentee ballots, jury lists, lobbying activities, public disclosure of records, retirement and pension benefits, legislative districting, and standing to bring lawsuits. Also, the impact of the proposal on the operation of the three branches of government, and the electoral process, is substantial. As just one example, the proposal strips the Legislature of any authority to propose and enact a legislative redistricting plan. It abrogates a portion of the judicial power by giving a new executive branch redistricting commission authority to conduct legislative redistricting. It then removes from the judicial branch the power of judicial review over the new commission's actions. We agree with the Attorney General that the proposal affects the "foundation power" of government by "wresting from" the legislative branch and the judicial branch any authority over redistricting and consolidating that power in the executive branch, albeit in a new independent agency with plenary authority over redistricting.

We have thoroughly reviewed the number, scope, breadth, and impact of the petition's changes to the fundamental governmental structure that our current constitution creates and allows. We are further cognizant of the abruptness with which some of the changes are to be made. For example, the reduction in the number of justices of the Supreme Court and the number of Court of Appeals judges is to be implemented

on December 20, 2008, and the reduction in the number of departments, boards, and commissions, and the establishment of the judicial performance commission, are to be made by April 2009. In addition, the proposal requires the convening of the new commission on legislative districting and the completion of the commission's work within months of the effective date of the proposal.

We conclude, in light of these factors, that the modification of, and interference with, the operation of government is so far-reaching and so substantial that, considering both the quantitative and the qualitative nature of the proposed changes, the RMGN initiative petition effects a "general revision" of, and not simply an "amendment" to, the constitution. The substantial entirety of the petition alters the core, fundamental underpinnings of the constitution, amounting to a wholesale revision, not a mere amendment.

Therefore, we conclude that the power of initiative established by Const 1963, art 12, § 2, for amending the constitution does not extend to the RMGN initiative petition. In light of our "threshold determination" that the RMGN initiative petition does not meet the constitutional prerequisites for acceptance, the Board and the Secretary now have a clear legal duty to reject the petition. Consequently, we grant the relief sought in the complaint for mandamus and preclude the proposal from being placed on the ballot.

(2) MULTIPLE PURPOSES

In light of our conclusion that the RMGN initiative petition does not meet the constitutional prerequisites for acceptance because the proposal at issue amounts to a "general revision" of the constitution, we need not make a "threshold determination" about whether the proposal also fails to meet the constitutional prerequi-

sites for acceptance because it serves more than one purpose. Consequently, we offer no opinion on whether a proposal submitted under the initiative petition procedure established by Const 1963, art 12, § 2, must embrace only a single purpose or whether the RMGN initiative petition would violate such a requirement.

IV. CONCLUSION

The RMGN initiative petition is overarching, of a reach and expanse never before seen in any constitutional initiative in Michigan's long history. It proposes fundamentally to redesign the very framework of the Michigan Constitution of 1963, which emerged after an historic convention and subsequent voter approval. The issue is not whether the motivation for the proposed changes is altruistic or parochial. And the issue is not whether any one, or several, or all of the proposals in the RMGN initiative petition are warranted or make sound public policy. The issue is that our present constitution contains specific language requiring that any proposal of the magnitude and enormity of the RMGN initiative petition be submitted to a constitutional convention, and then to the citizens for approval. We may not blithely ignore or conveniently overlook Const 1963, art 12, § 3, requiring a constitutional convention for any "general revision." The Michigan Constitution has transcended, and will continue to transcend, the lifetime of any single constituency, and it demands no less than a rigorous application of its prescribed methods for modification.

We grant the relief sought in the complaint for a writ of mandamus.

No costs, a public question being involved. We retain jurisdiction. This opinion is to have immediate effect, MCR 7.215(F)(2).

SHEMBER v UNIVERSITY OF MICHIGAN MEDICAL CENTER

Docket No. 276515. Submitted June 11, 2008, at Lansing. Decided August 21, 2008, at 9:00 a.m. Leave to appeal sought.

Linda Shember brought a medical-malpractice action in the Washtenaw Circuit Court against the University of Michigan Medical Center, nine individual physicians, and others. The plaintiff mailed a notice of intent to file a claim on July 20, 2005, alleging that she had suffered paralysis and other injuries caused by the failure of health-care providers at defendant University of Michigan Hospital to timely and appropriately diagnose and treat her condition when she sought care in 2003, and that she had also suffered later injuries because of improper postoperative care. The plaintiff had amended her notice of intent on January 18, 2006, to add an allegation regarding a clinical visit in 2003 and to set forth the applicable standards of care more specifically. Two days later, the plaintiff brought the instant action. The individual defendants moved for summary disposition on the ground that the plaintiff's claims were barred by the statute of limitations, and also that her claim with respect to one of the defendants lacked an appropriate affidavit of merit. The plaintiff moved to amend her complaint to add other theories of liability and to allege that she had been unable to identify four of the defendants in her initial notice of intent because the defendants had fraudulently concealed their identities by withholding certain medical records. The court, David S. Swartz, J., dismissed with prejudice the plaintiff's claims against five of the physicians and denied her motion to amend with respect to the claim of fraudulent concealment, but allowed the parties to file briefs regarding the plaintiff's additional theories of liability concerning the remaining defendants. The defendants affiliated with the University of Michigan were dismissed without prejudice by stipulation. The court ultimately dismissed the four remaining individual defendants with prejudice on the ground that the statutory period of limitations had expired and denied the plaintiff's motions for reconsideration and to amend her complaint. The plaintiff appealed.

The Court of Appeals *held*:

1. With respect to the four defendants who were not named in the plaintiff's original notice of intent, the trial court correctly

ruled that there was no evidence of fraudulent concealment. The evidence did not support an inference that employees of the University of Michigan defendants had embarked on a course of action designed to prevent or hinder the plaintiff from identifying the individual physicians who might be liable for medical malpractice, and the plaintiff offered no evidence that she could not have timely accessed or obtained copies of the records through other means. Even if the summary-disposition motion had been properly considered under MCR 2.116(C)(7) rather than (C)(8), reversal would be unwarranted because the amendment would have been futile.

2. The claims against four of the individual defendants who were named in the plaintiff's original notice of intent were properly dismissed because the notice did not set forth sufficiently specific allegations of fact or standards of care. The defective notice of intent was not sufficient to toll the period of limitations under *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57 (2002), which held that the notice requirements of MCL 600.2912b must be met to toll the period of limitations under the plain language of MCL 600.5856. Although MCL 600.5856 was amended after *Roberts* was decided, the substantive requirement of the presuit-notice tolling provision was not changed by that amendment; therefore, *Roberts* remains binding precedent.

3. Although the court may have erred in dismissing with prejudice the claim against the internal-medicine specialist on the basis of the plaintiff's failure to file a conforming affidavit of merit, it reached the right result because the notice of intent was also deficient and therefore did not toll the period of limitations.

Affirmed.

WHITE, J., concurring in part and dissenting in part, agreed that dismissal with prejudice was appropriate with respect to seven of the nine individual defendants, but disagreed with respect to the two emergency-room physicians because the notice of intent, read in its entirety, stated a specific standard of care and set forth the specific actions required to comply with that standard. Because the first notice of intent tolled the period of limitations, the second notice of intent was timely; therefore, the case should be remanded for a determination whether the second notice of intent was sufficient to warrant a dismissal without prejudice.

NEGLIGENCE — MEDICAL MALPRACTICE — LIMITATION OF ACTIONS — NOTICES OF INTENT TO FILE SUIT.

The amendment of MCL 600.5856 did not alter the fact that the notice requirements of MCL 600.2912b must be met to toll the period of limitations for medical-malpractice actions (MCL 600.2912b; MCL 600.5856[c]).

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Natalie C. Qandah, P.C.* (by *Natalie Qandah*), for Linda Shember.

Foster, Swift, Collins & Smith, P.C. (by *Richard C. Kraus*), for Pia M. Sundgren and others.

Before: MARKEY, P.J., and WHITE and WILDER, JJ.

MARKEY, P.J. In this medical malpractice action, plaintiff appeals by right the trial court's February 5, 2007, order granting summary disposition in favor of four individual defendants, Drs. Carol L. Bradford, Dale Ekbom, James A. Freer, and Paul DeFlorio. Plaintiff also challenges the trial court's earlier June 5, 2006, order dismissing her claims against the other five individual defendants, Drs. Pia M. Sundgren, Anthony D'Amico, Steven Kronick, John N. Shenk, and Steven Krafcik, and denying her motion to amend the complaint to allege fraudulent concealment. We affirm.

I. BACKGROUND

On July 31, 2003, plaintiff underwent surgery at the University of Michigan Hospital to drain a cervical epidural abscess. She allegedly developed left hemiplegia before the surgery, which left her without the use of her left arm and leg. In a notice of intent to file a claim, MCL 600.2912b, mailed on July 20, 2005, plaintiff asserted that her condition was caused by the failure of health care providers to timely and appropriately diagnose and treat her condition on July 24 and 30, 2003, and that she suffered further injury because of improper postoperative care. The notice was addressed to the University of Michigan Hospitals & Health Centers, various unnamed persons, and 20 named physicians,

including five of the individual defendants, Drs. Bradford, Ekbom, Freer, DeFlorio, and Krafcik.

In an amended notice of intent, dated January 18, 2006, plaintiff modified the basis of her claims against the individual defendants in this case to allege more specific standards of care applicable to emergency physicians and nurses, the "radiologist/neuroradiologist," and "ENT consulting physicians," and added allegations regarding a July 28, 2003, clinical visit.

On January 20, 2006, plaintiff filed the instant action against the University of Michigan defendants and the nine individual defendants. In February 2006, the individual defendants moved for summary disposition under MCR 2.116(C)(7) and (10) on the grounds that plaintiff's claims were barred by the statute of limitations and that the claim against Dr. Krafcik lacked an appropriate affidavit of merit required by MCL 600.2912d. Before the hearing on the motion for summary disposition, plaintiff moved to amend her complaint pursuant to MCR 2.116(I)(5) and 2.118(A)(2) to add additional theories of liability and to allege fraudulent concealment. In a proposed amended complaint filed with the motion, plaintiff alleged that "defendants," by withholding certain medical records, fraudulently concealed the identity of the four individual defendants who were not named in her initial presuit notice of intent to file a claim.

Following a hearing on May 17, 2006, the trial court entered an order dated June 5, 2006, dismissing with prejudice plaintiff's claims against Drs. Sundgren, D'Amico, Kronick, Shenk, and Krafcik. Plaintiff's motion to amend her complaint to allege fraudulent concealment was also denied. The trial court allowed the parties to file supplemental briefs with respect to the remaining individual defendants and the additional theories of liability alleged in plaintiff's proposed

amended complaint. Plaintiff also filed a motion for reconsideration of the order denying her motion to amend her complaint to allege fraudulent concealment, asserting that she had additional evidence to support the claim.[1]

On February 5, 2007, the trial court issued an opinion and order dismissing the four remaining individual defendants, Drs. Bradford, Ekbom, Freer, and DeFlorio, with prejudice. Plaintiff's motions for reconsideration and to amend her complaint were also denied.

II. STANDARD OF REVIEW

We review de novo a trial court's grant of summary disposition to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Questions of statutory construction are also reviewed de novo. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred because of a statute of limitations. The moving party may support the motion with affidavits, depositions, admissions, or other documentary evidence. *Maiden*, *supra* at 119. Such evidence is considered to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6). The allegations in the complaint are accepted as true unless contradicted by the documentary evidence. *Maiden, supra* at 119. "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

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[1] The University of Michigan defendants were dismissed without prejudice pursuant to a stipulated order dated July 31, 2006.

We review a trial court's denial of a motion to amend a complaint for an abuse of discretion. *Weymers v Khera,* 454 Mich 639, 654; 563 NW2d 647 (1997). An abuse of discretion occurs when a trial court's decision falls outside the range of principled outcomes. *Woodard*, *supra* at 557. A motion to amend under MCR 2.118 should ordinarily be granted, but may be denied for the following particularized reasons: " '[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of the amendment, [and 5] futility . . . .' " *Sands Appliance Services, Inc v Wilson,* 463 Mich 231, 239-240; 615 NW2d 241 (2000), quoting *Ben P Fyke & Sons v Gunter Co,* 390 Mich 649, 656; 213 NW2d 134 (1973).

III. MALPRACTICE CLAIMS AGAINST DRS. SUNDGREN, D'AMICO, KRONICK, AND SHENK

Because it concluded that the statutory period of limitations had expired, the trial court granted summary disposition in favor of Drs. Sundgren, D'Amico, Kronick, and Shenk, who were not named in plaintiff's initial notice of intent to file a claim. The trial court further determined that plaintiff had failed to demonstrate any reason for tolling the limitations period in spite of plaintiff's claim of fraudulent concealment or the initial or amended notice of intent to file a claim.

Initially, we note that this Court previously denied defendants' motion to strike the portion of plaintiff's brief relating to the earlier June 5, 2006, order. *Shember v Univ of Michigan Med Ctr*, unpublished order of the Court of Appeals, entered November 30, 2007 (Docket No. 276515). Further, plaintiff's failure to list each individual defendant as an appellee in the claim of

appeal, as required by MCR 7.204(D)(1), was not fatal to this Court's jurisdiction over the four individual defendants, who each received notice of the appeal. See *Kaufman & Payton, PC v Nikkila,* 200 Mich App 250, 258 n 1; 503 NW2d 728 (1993) (CONNOR, J., dissenting). Additionally, a party claiming an appeal of right from a final order is free to raise issues on appeal related to prior orders. See *Bonner v Chicago Title Ins Co,* 194 Mich App 462, 472; 487 NW2d 807 (1992). Therefore, appellate review of the trial court's decision dismissing these four individual defendants is not precluded.

Nonetheless, "[i]t is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald,* 237 Mich App 186, 197; 602 NW2d 834 (1999). An appellant may not leave it to this Court to discover and rationalize the basis of a claim. *Peterson Novelties, Inc v City of Berkley,* 259 Mich App 1, 14; 672 NW2d 351 (2003). Although this Court may overlook preservation requirements in certain circumstances, "a party's failure to brief an issue that necessarily must be reached precludes appellate relief." *City of Riverview v Sibley Limestone*, 270 Mich App 627, 638; 716 NW2d 615 (2006).

Here, plaintiff has not raised any issue challenging the trial court's determination that, absent a legally cognizable tolling event, the two-year limitations period in MCL 600.5805(6) expired before the complaint was filed on January 20, 2006; consequently, summary disposition of the malpractice claims against Drs. Sundgren, D'Amico, Kronick, and Shenk was proper under MCR 2.116(C)(7). Further, plaintiff does not argue that she may take advantage of the presuit notice tolling provision in MCL 600.5856 with respect to these individual defendants.

At best, plaintiff has presented an issue challenging the trial court's determination that there was no evidence of fraudulent concealment to toll the limitations period. But plaintiff incorrectly presents this issue solely as one relevant to whether she should have been allowed to amend her complaint to add a substantive claim for fraudulent concealment.

It is true that a plaintiff must allege in a complaint facts supporting fraudulent concealment in order to rely on the fraudulent concealment tolling provision.[2] *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996); *Dunmore v Babaoff*, 149 Mich App 140, 146-147; 386 NW2d 154 (1985). But the fraudulent concealment tolling provision is not itself a substantive cause of action for which a plaintiff may recover damages from a tortfeasor.

Fraudulent concealment is recognized as a tolling event in MCL 600.5855. See *Sills*, *supra*; *Dunmore*, *supra*. Plaintiff is charged with the discovery of facts that with the exercise of reasonable diligence she ought to have discovered. *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute,* 266 Mich App 39, 45-46 n 2; 698 NW2d 900 (2005). To prove fraudulent concealment, plaintiff must show that a person who is or may be liable for the claim engaged in some arrangement or contrivance of an

[2] MCL 600.5855 provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

affirmative character that was designed to prevent subsequent discovery of the existence of the claim or the identity of the person liable for the claim. *Doe v Roman Catholic Archbishop*, 264 Mich App 632, 642-643; 692 NW2d 398 (2004); *Sills*, *supra* at 310. Plaintiff must specifically plead the acts or misrepresentations that comprised the fraudulent concealment and prove that they were designed to prevent subsequent discovery. *Phinney v Perlmutter,* 222 Mich App 513, 563; 564 NW2d 532 (1997); *Dunmore, supra* at 147.

Because tolling based on fraudulent concealment relates to the statute of limitations, it is appropriately reviewed under MCR 2.116(C)(7). *Meyer & Anna Prentis Family Foundation, Inc, supra* at 46 n 3. Therefore, it was appropriate for the trial court to consider the evidence the parties submitted when reviewing defendants' motion for summary disposition. MCR 2.116(G)(5).

The affidavits plaintiff and her counsel executed aver that they both attended a meeting on September 2, 2004, at the University of Michigan's risk management department and were provided with incomplete medical records at that time. Plaintiff's counsel averred, and documentary evidence confirmed, that an issue arose in February 2005 regarding whether it was necessary that plaintiff execute a release to authorize counsel's receipt of the records, but there was no evidence that plaintiff executed or timely provided the release.[3] And while plaintiff's counsel averred that she was unsuccessful in obtaining copies of additional records from the risk management department, plaintiff averred that she was

[3] We note that plaintiff submitted additional evidence with her motion for reconsideration of the trial court's denial of her motion to amend the complaint, but plaintiff does not challenge the trial court's decision to deny the motion for reconsideration.

able to obtain copies of the records in August 2005, by personally going to the University of Michigan's records department.

We must consider the evidence in the light most favorable to plaintiff. *Brennan v Edward D Jones & Co,* 245 Mich App 156, 157; 626 NW2d 917 (2001). In so doing, we agree with the trial court that there was no evidence of fraudulent concealment. Plaintiff was required to exercise reasonable diligence. *Meyer & Anna Prentis Family Foundation, Inc, supra* at 46 n 2. Assuming for purposes of review that the University of Michigan was or may be liable within the meaning of MCL 600.5855, plaintiff's counsel's inability to obtain medical records from the university's employees plainly suggested the need for some other course of action to either view or obtain copies of the records. The evidence did not support an inference that the employees had embarked on a course of action designed to prevent or hinder plaintiff's identifying the particular physicians who might be liable for medical malpractice. Further, plaintiff offered no evidence that she could not have, with reasonable diligence, timely accessed or obtained copies of the records through other means, such as when, according to plaintiff's affidavit, she personally went to the records department in August 2005 and obtained the records.

Because plaintiff's original complaint did not allege fraudulent concealment and because plaintiff failed to demonstrate any evidence showing a genuine issue of material fact regarding this issue, we uphold the trial court's grant of summary disposition under MCR 2.116(C)(7) in favor of Drs. Sundgren, D'Amico, Kronick, and Shenk. *Holmes*, *supra* at 706. Further, given the lack of evidence to support this tolling theory, the trial court did not abuse its discretion in denying

plaintiff's motion to amend the complaint to plead fraudulent concealment. Only where summary disposition is based on MCR 2.116(C)(8), (9), or (10) is a trial court required to give a party an opportunity to amend the complaint. MCR 2.116(I)(5); *Weymers, supra* at 658. Even then, the evidence before the trial court can be considered in determining if an amendment would be justified. MCR 2.116(I)(5); see also *Ormsby v Capital Welding, Inc,* 471 Mich 45, 52-60; 684 NW2d 320 (2004). Therefore, even if we were to treat this case as involving a motion under MCR 2.116(C)(8) instead of MCR 2.116(C)(7), we would not reverse because the evidence before the trial court when it decided the motion indicates that an amendment would have been futile. *Ormsby*, *supra* at 53, 60; *Dunmore*, *supra* at 147.

IV. MALPRACTICE CLAIMS AGAINST DRS. BRADFORD, EKBOM, FREER, AND DEFLORIO

The trial court granted summary disposition in favor of Drs. Bradford, Ekbom, Freer, and DeFlorio on the ground that plaintiff's claims were barred by the statute of limitations. It determined that plaintiff could not take advantage of the presuit notice tolling provision in MCL 600.5856(c) because her initial notice of intent mailed on July 20, 2005, did not comply with the requirement of MCL 600.2912b(4)(b) that the notice identify the applicable standard of practice or care.

Although the trial court did not articulate the particular subrule of MCR 2.116 on which it relied, the individual defendants sought summary disposition under MCR 2.116(C)(7), which is appropriately applied to claims based on a statute of limitations. *Meyer & Anna Prentis Family Foundation, Inc, supra* at 46 n 3.

Plaintiff's principal argument is that the trial court erred in finding that her initial presuit notice of intent

failed to comply with MCL 600.2912b(4)(b). We disagree. Under *Roberts v Mecosta Co Gen Hosp (After Remand),* 470 Mich 679, 690-696; 684 NW2d 711 (2004) (*Roberts II*), a plaintiff must identify in a readily ascertainable manner all the specific information mandated by the statute regarding each particular professional or facility that is named in the notice. The notice is not required to be accurate in every respect. *Id*. at 691. But a plaintiff must "make good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings." *Id*. at 701 (emphasis in original); see also *Boodt v Borgess Med Ctr*, 481 Mich 558, 560-561; 751 NW2d 44 (2008). The standard applicable to one defendant is not necessarily the standard applicable to another defendant. *Roberts II*, *supra* at 694 n 11. The degree of specificity must allow potential defendants to understand the nature of the claims against them. *Id*. at 701. A plaintiff must only " 'specify what it is that she is *claiming* under each of the enumerated categories in § 2912b(4).' " *Boodt, supra* at 561, quoting *Roberts II*, *supra* at 701 (emphasis in original).

In this case, plaintiff's notice was addressed to the University of Michigan Hospitals & Health Centers; 20 individuals from a variety of departments, including emergency medicine, physical medicine and rehabilitation, otolaryngology, neurosurgery, and radiology; and unnamed individuals. The only factual allegation directed at Dr. Bradford, an alleged member of the Department of Otolaryngology, was that a "second esophageal dilation was performed on June 8, 2003." Plaintiff also alleged a different esophageal dilation by Dr. Rontal, also an alleged member of the Department of Otolaryngology, that resulted in a torn esophagus. The standard of care alleged in the notice did not

address the June 8 dilation, but rather contained broad allegations regarding the alleged failure of health care providers to timely and appropriately diagnose and treat plaintiff's condition in the emergency room on July 24 and 30, 2003, broad allegations regarding postoperative care, and a general allegation that the "applicable standard of care required the Health Care providers to avoid perforation during an esophageal dilation; timely and appropriately appreciate Claimant's complaints and symptoms, timely and appropriately diagnosis and treat Claimant's condition in the ER which would include, but is not limited to, ordering appropriate films in an emergent and STAT manner . . . ."

Without a more exacting statement of the standard of care applicable to an otolaryngologist, who previously performed an esophageal dilation as alleged in the notice, Dr. Bradford would be left to guess at the basis of plaintiff's claim. Examined in its entirety, the notice was insufficient to inform Dr. Bradford of the standard of care applicable to her circumstances, as required by MCL 600.2912b(4)(b). Cf. *Gawlik v Rengachary*, 270 Mich App 1, 10-11; 714 NW2d 386 (2006) (notice of intent inadequate where it generally encompassed all caregivers and failed to explain what the physician should have done).

Plaintiff's claim with respect to Dr. Ekbom, also an alleged member of the Department of Otolaryngology, is even vaguer, because the notice does not contain any particular factual allegations against him. Plaintiff's claims against Dr. Freer, an alleged member of the Department of Emergency Medicine, similarly contain no specific factual allegations. Viewed in conjunction with the standard of care that is generally directed at the health care providers mentioned in the notice, the

notice is inadequate to satisfy MCL 600.2912b(4)(b) with respect to these physicians.

The factual basis of plaintiff's claim with respect to Dr. DeFlorio, an alleged member of the "Department of Emergency Department," is more detailed. The notice indicates that it relates to the events of July 30, 2003, in the emergency room:

> Claimant returned to the Emergency Room on July 30, 2003 at approximately 1:00 a.m. and again presented with extreme pain in her neck and shoulders. Claimant was kept in the ER for approximately 17 hours during which she had experienced progressive neurological deficit for which nothing was done. Due to incomplete records, *it is believed that Dr. DeFlorio attempted to spinal tap 2-3 times at some point during Claimant's 17 hours in the ER for suspected meningitis, for which he failed each time and left Claimant to excruciating pain. Dr. DeFlorio then indicated that he was "needed elsewhere" and left Claimant to continue to sit in the ER while Claimant continued to experience progressive neurological deficit for which nothing was done*. Specifically, Plaintiff was losing mobility and control of her left arm which she had control of 17 hours ago, prior to her walking into the ER of the University of Michigan Hospital. Claimant repeatedly advised her treaters of her increasing inability to move her left arm throughout her course in the ER. An MRI was finally taken sometime approximately late evening on July 30, 2003, which showed massive infection. . . . The next day, on July 31, 2003, Dr. Frank LaMarca performed a posterior cervical fusion-vertex. [Emphasis added.]

Further, the alleged standard of care contained some specific allegations directed at the events of July 30, 2003:

> The Health Care Providers should have also timely and appropriately diagnosed and treated Claimant's condition upon her second presentation to the ER on July 30, 2003 wherein she had the same complaints of extreme and unbearable pain in her neck and shoulders and was also

> experiencing progressive neurological deficit over the course of approximately 17 hours. The applicable standard of care required the Health Care providers to . . . timely and appropriately diagnose and treat Claimant's condition in the ER which would include, but is not limited to, ordering appropriate film in an emergent or STAT manner, order timely CBCs, order timely or emergent/STAT consults including neurosurgery for a patient who was experiencing progressive neurological deficit, obtain Claimant's past medical history and consult known treaters of Claimant in a timely fashion to understand and appreciate Claimant's past medical history, immediately order a STAT MRI and immediately take the Claimant to the operating room given the presence of massive infection and cord compression.

The alleged manner in which the standard of care was breached also refers to the events on July 30, 2003, and, in particular, alleges that there was a failure to "to timely obtain and review results of CBC, MRI, neurosurgery consult, failure to be admitted or triaged while in the ER instead of waiting 17 hours in an ER cubical [sic] during which nothing was done regarding Claimant's progressive neurological deficit . . . ."

The problem with the notice is that it does not indicate that Dr. DeFlorio was the only physician to see plaintiff during her 17-hour stay in the emergency room or that he became involved in her care for any purpose other than the attempted spinal taps. To the contrary, plaintiff alleged that there were other unidentified "treaters." In addition, the alleged standard of care is not particularized to Dr. DeFlorio's circumstances, or even emergency physicians in general, but rather is directed at the "health care providers" mentioned in the notice. The notice suggests that the same list of actions would apply to all health care providers who had contact with plaintiff in the emergency room.

On the other hand, Dr. DeFlorio, as a medical professional, would presumably have ready access to information about the case after being provided with notice of the claim against him. Thus, it would be easy for him to comprehend the factual nature of the impending lawsuit. Further, while the unique standard applicable to a particular defendant is an element of a malpractice action, the presuit notice need not contain a perfect rendition of the applicable standard of care. *Roberts II*, *supra* at 692-694.

Examining the notice in its entirety, we conclude that no guesswork is necessary for Dr. DeFlorio to appreciate that the basis of the claim against him was that he should not have left plaintiff sitting untreated and unattended in the emergency room; he should have taken some action other than the attempted spinal taps. But without any particularization of which listed actions in the alleged standard of care for health care providers apply to Dr. DeFlorio, the notice is insufficient to inform him of what he did not do or should have done to comply with the applicable standard of care. Because the notice examined in its entirety does not comport with plaintiff's responsibility to make a good-faith averment of all the requirements of the statute pertaining to Dr. DeFlorio, we uphold the trial court's determination that plaintiff failed to satisfy MCL 600.2912b(4)(b).

Next, plaintiff claims that a defect in the notice required under MCL 600.2912b does not prevent her from taking advantage of the presuit notice tolling provision in MCL 600.5856. Although plaintiff failed to present this legal issue to the trial court, we will consider plaintiff's argument because the trial court specifically held that a notice that does not comply with the requirements set forth in MCL 600.2912b(4) does

not toll the period of limitations under MCL 600.5856(c). This Court may overlook preservation requirements to consider an issue that is necessary to a proper resolution of the case. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007).

First, we note that the trial court relied on MCL 600.5856(c) as amended by 2004 PA 87, effective April 22, 2004. This statute was amended after the alleged malpractice in this case. As amended, MCL 600.5856(c) provides that the period of limitations is tolled

> [a]t the time notice is given in compliance with the applicable notice period under [MCL 600.2912b], if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

Conversely, at the time of the alleged malpractice in this case, former MCL 600.5856(d) provided that the period of limitations is tolled

> [i]f, during the applicable notice period under [MCL 600.2912b], a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with [MCL 600.2912b].

In general, amendments to statutes of limitations apply prospectively. See *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155; 725 NW2d 56 (2006). But there is no vested right in the running of a period of limitations, except when it has completely run and the action is barred. *In re Straight's Estate*, 329 Mich 319, 325; 45 NW2d 300 (1951). Here, enacting § 1 of the amendatory act provides that it applies to civil

actions filed after April 22, 2004, unless the period of limitations expired before that date. Thus, the amended statute applies to this case.

Nonetheless, we find no merit to plaintiff's argument that the amended statute substantively changed the effect of the presuit notice tolling provision. An unambiguous statute is enforced according to its plain language. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 66; 642 NW2d 663 (2002) (*Roberts I*). 2004 PA 87 did not change the substance of the presuit notice tolling provision.

Plaintiff's reliance on *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), as support for how the presuit notice tolling provision in MCL 600.5856(c) should operate, is misplaced. The issue in *Kirkaldy* involved application of the tolling provision in MCL 600.5856(a) under the former version of the statute, before it was amended by 2004 PA 87. Under MCL 600.5856(a), tolling commences "[a]t the time the complaint is filed and a copy of the summons and complaint are served on the defendant." See *Kirkaldy, supra* at 584 n 4.[4] Viewed in conjunction with the requirement in MCL 600.2912d that the complaint be accompanied by an affidavit of merit, our Supreme Court concluded that the "period of limitations is tolled when a complaint and affidavit of merit are filed and served on the defendant" and that the tolling continues, even if the affidavit is defective, until the presumptive validity of the affidavit is successfully challenged in a subsequent judicial proceeding. *Kirkaldy*, *supra* at 585-586.

This case is distinguishable from *Kirkaldy* because in that case the plaintiff had presumably filed a notice of

[4] The amended version of MCL 600.5856(a) provides that tolling commences "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules."

intent in compliance with MCL 600.2912b, and the presuit notice tolling provision in MCL 600.5856(c) was not at issue. See *Boodt, supra* at 564. And while this Court recently concluded in *Potter v McLeary (On Remand)*, 278 Mich App 279, 286; 748 NW2d 599 (2008), that the Supreme Court's treatment of deficient affidavits of merit in *Kirkaldy* applies by analogy to deficient notices of intent under MCL 600.2912b so as to permit a notice of intent to toll the period of limitations unless and until the notice is successfully challenged in a judicial proceeding, this Court did not consider the specific presuit notice tolling provision in MCL 600.5856(c). Further, this Court did not apply our Supreme Court's holding in *Roberts I*, *supra* at 67, that compliance with MCL 600.2912b is required to toll the period of limitations because the plain language of MCL 600.5856 requires the plaintiff to comply with the provisions of MCL 600.2912b in order to toll the limitations period. Although MCL 600.5856 was amended after our Supreme Court's decision, because the substantive requirement of the presuit notice tolling provision was not changed, the holding in *Roberts I* that compliance with MCL 600.2912b is required to toll the period of limitations remains valid, binding law.[5]

We are bound to follow a published opinion of this Court establishing a rule of law that our Supreme Court or a special panel of this Court has not reversed or modified. MCR 7.215(J)(1). But under the doctrine of stare decisis, this Court must follow decisions of our Supreme Court. *People v Hall,* 249 Mich App 262, 270;

[5] As a practical matter, we note that MCL 600.2912b establishes an interval of time in which a potential plaintiff is not permitted to sue for medical malpractice. If the interval ends before the period of limitations expires, the presuit notice tolling provision in MCL 600.5856 is of no consequence. See *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 8-9; 704 NW2d 69 (2005).

643 NW2d 253 (2002), remanded on other grounds 467 Mich 888 (2002). "[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Boyd v W G Wade Shows,* 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds by *Karaczewski v Farbman Stein & Co,* 478 Mich 28 (2007). We conclude that *Roberts I* remains valid precedent. See *Boodt, supra* at 561-563. Consequently, we reject plaintiff's claim that the defective notice of intent was sufficient to toll the period of limitations with respect to Drs. Bradford, Ekbom, Freer, and DeFlorio.

We also reject plaintiff's claim that she should have been afforded an opportunity to file an amended notice of intent to correct any deficiency in the notice of intent mailed on July 20, 2005, pursuant to MCL 600.2301. Plaintiff has failed to establish that she preserved this issue by presenting it to the trial court. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

Even if we were to overlook this deficiency on appeal, *Laurel Woods Apartments*, *supra* at 640, we would reject plaintiff's argument because MCL 600.2301 has no application to the presuit notice required under MCL 600.2912b. *Boodt, supra* at 563 n 4. Dismissal with prejudice is an appropriate remedy when a period of limitations has expired. See *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). Prejudice to a defendant is not a factor in applying the relevant medical malpractice statutes. See *Burton v Reed City Hosp Corp*, 471 Mich 745, 753; 691 NW2d 424 (2005).

Because the Legislature has not authorized retroactive amendment of the presuit notice to toll the period of limitations, plaintiff has not shown any error in the

trial court's failure to afford her an opportunity to amend the notice. Thus, plaintiff has not demonstrated any basis for disturbing the trial court's determination that her malpractice claims against Drs. Bradford, Ekbom, Freer, and DeFlorio were time-barred. We affirm the trial court's decision granting their motion for summary disposition and dismissing plaintiff's claims against them with prejudice.

V. MALPRACTICE CLAIM AGAINST DR. KRAFCIK

The trial court's grant of summary disposition in favor of Dr. Krafcik was based on plaintiff's failure to file an affidavit of merit with the complaint that complied with MCL 600.2912d. Specifically, plaintiff failed to file an affidavit comporting with Dr. Krafcik's proper board certification as an internal medicine specialist.

On appeal, plaintiff does not challenge the trial court's ruling. Plaintiff only asserts that the trial court erred in dismissing her claim with prejudice on the basis of *Kirkaldy*. Although we find merit to plaintiff's argument, we will not reverse a trial court's decision if the right result was reached, albeit for the wrong reason. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

Here, the same deficiency in the July 20, 2005, presuit notice that exists with respect to Drs. Bradford, Ekbom, Freer, and DeFlorio also exists with respect to Dr. Krafcik. The only allegation in the notice with respect to Dr. Krafcik was that he was a member of the Department of Emergency Medicine. The notice was insufficient to toll the period of limitations under MCL 600.5856(c). As with plaintiff's claims against Drs. Bradford, Ekbom, Freer, and DeFlorio, dismissal with prejudice was appropriate because the period of limitations had expired.

We affirm.

WILDER, J., concurred.

WHITE, J. (*concurring in part and dissenting in part*). I agree that the circuit court did not err by denying plaintiff's motion to amend her complaint to allege fraudulent concealment. Although amendment normally should be permitted, and the factual support then tested by summary disposition, in the instant case plaintiff provided the court, through her attorney's affidavit, with the factual basis for her claim of fraudulent concealment, and the court did not err in rejecting that basis as inadequate. Thus, I agree with the affirmance with respect to the defendants first identified by name in the amended notice of intent (NOI). I also agree that the NOI is insufficient with respect to Doctors Bradford and Ekbom, the otolaryngologists.

I disagree with respect to Doctors Freer and DeFlorio, the emergency-room physicians. Read in its entirety, the NOI sufficiently states that the emergency-room doctors violated the standard of care by failing to order appropriate films in an emergent or stat manner, order timely complete blood counts, order timely or emergent/stat consultations, including neurosurgery in view of plaintiff's progressive neurological deficit, obtain plaintiff's past medical history and consult her treaters, and order a stat magnetic resonance imaging and immediately take plaintiff to surgery given the presence of massive infection and cord compression.

The claimed deficiency in the NOI is its failure to specifically state the standard of care applicable to each defendant. The NOI does, however, state a specific standard of care. In contrast to the tautological statement involved in *Roberts v Mecosta Co Gen Hosp (After*

Remand), 470 Mich 679; 684 NW2d 711 (2004) —specifically, that the standard of care required that the health care professionals render competent advice and assistance in the care and treatment of the plaintiff and render the same in accordance with the standard of care—the NOI here set forth the specific actions required to comply with the standard of care. While the NOI referred to "Health Care Professionals" rather than to emergency-room physicians, the statement of facts, read together with the statement of the applicable standard of care, sufficiently identifies the standard applicable to the emergency-room physicians.

I agree with plaintiff that, under the amended version of MCL 600.5856(c), giving notice in compliance within the applicable notice period under MCL 600.2912b operates to toll the period of limitations if the claim would be barred during that period. However, § 5856(c) expressly provides that the period of limitations is tolled for a period not longer than the number of days remaining in the notice period. Hence, plaintiff makes the additional argument that the filing of the complaint and affidavits of merit further tolled the running of the period of limitations under § 5856(a) and *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), until the claim was dismissed, and that the dismissal should have been without prejudice.

In *Boodt v Borgess Med Ctr*, 481 Mich 558; 751 NW2d 44 (2008), decided after this case was submitted, our Supreme Court declined to apply *Kirkaldy* in the context of a defective NOI and rejected the argument that the filing of a complaint and affidavit of merit after giving a defective NOI tolls the period of limitations under § 5856(a). However, *Boodt* is distinguishable because in the instant case plaintiffs filed an amended

NOI[1] within the statutory limitations period.[2] To be sure, because the complaint was filed just days after the amended NOI was sent, it was premature. However, the remedy for this is dismissal without prejudice. *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26; 594 NW2d 455 (1999). Thus, because the first NOI tolled the limitations period, the second NOI was timely; if the second NOI was sufficient, the action was timely but premature, and the dismissal should have been without prejudice, notwithstanding *Boodt*.[3] I would remand for determination whether the amended NOI was sufficient.[4]

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[1] The first amended NOI, sent January 18, 2005, was far more detailed and specific than the original NOI.

[2] The original NOI was sent with at least six days remaining in the statutory limitations period and thus, even if inadequate, under the amended tolling provision of § 5856(c), it tolled the period of limitations for the time remaining in the notice period. The amended NOI was sent 182 days later and was thus sent within the statutory limitations period.

[3] Section 2912b(6) is not implicated because we are not here concerned with tacking.

[4] The amended NOI cannot under any circumstances save the action against the doctors first named in it because the original NOI did not toll the limitations period with respect to them.

INSURANCE INSTITUTE OF MICHIGAN v COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICES

Docket No. 262385. Submitted October 10, 2006, at Lansing. Decided August 21, 2008, at 9:05 a.m. Leave to appeal sought.

The Insurance Institute of Michigan and others brought an action in the Barry Circuit Court against the Commissioner of the Office of Financial and Insurance Services (OFIS), seeking declaratory and injunctive relief against the defendant as a result of certain administrative rules promulgated by the commissioner that require insurers to stop using "insurance scoring," the use of an insured's credit information for the purpose of predicting the future loss exposure of the individual insured, as a rating factor. The Michigan Insurance Coalition and Citizens Insurance Company of America were allowed to intervene in the action as plaintiffs. The court, James H. Fisher, J., granted declaratory relief in favor of the plaintiffs, determining that the rules were illegal, invalid, and unenforceable, and permanently enjoined the defendant from enforcing the rules against any of the plaintiffs or intervening plaintiffs. The defendant appealed, asserting that the validity of the rules may only be reviewed by petition for judicial review in the manner provided by § 101 of the Administrative Procedures Act (APA), MCL 24.301, and that under § 104 of the APA, MCL 24.304, such review is confined to the agency record. The defendant maintained that the circuit court erred in entertaining the plaintiffs' original action and in failing to consider the agency record. In addition, the defendant asserted that, even if an original action were proper, the plaintiffs failed to comply with the requirement of § 64 of the APA, MCL 24.264, that a plaintiff first request a declaratory ruling from the agency.

The Court of Appeals *held*:

1. This matter was properly before the circuit court.

2. The circuit court erred in failing to limit its review to the administrative record.

3. The opinion and order granting the permanent injunction must be vacated.

Vacated.

WHITE, P.J., concluded that the circuit court erred in failing to base its review on the administrative record and in accepting additional evidence, and further erred in its conclusions on the merits, at least with regard to insurance issued under chapter 21 of the Insurance Code, MCL 500.2101 to 500.2138. Therefore, the circuit court's order and injunction with regard to insurance under chapter 21 should be reversed, the order and injunction with regard to insurance issued under chapter 24, MCL 500.2400 to 500.2484, and chapter 26, MCL 500.2600 to 500.2674, of the Insurance Code should be vacated, and the matter should be remanded for further proceedings.

ZAHRA, J., concluded that the circuit court properly entertained the plaintiffs' original action challenging the legality of the rules and that the court erred in rejecting the administrative record and by creating its own record. However, the error regarding the record was harmless because the issue resolved by the circuit court was a purely legal question. The OFIS exceeded its statutory authority in promulgating the rules; therefore, the circuit court properly concluded that the rules are illegal and invalid. The opinion and order of the circuit court should be affirmed.

KELLY, J., concluded that the circuit court erred in failing to limit its review to the administrative record and the opinion and order granting a permanent injunction should be vacated for that reason alone. This matter was not properly before the circuit court because the court erred in permitting the plaintiffs to proceed by way of an original action. The case should be dismissed without prejudice to allow the plaintiffs to file a petition for review under MCL 500.244.

Dickinson Wright PLLC (by *Peter H. Ellsworth*, *Jeffery V. Stuckey*, and *Allen L. Lanstra, Jr.*) for the plaintiffs.

Dykema Gossett PLLC (by *Lori McAllister* and *Kurt D. Gallinger*) for the intervening plaintiffs.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *William A. Chenoweth*, Assistant Attorney General, for the defendant.

Amici Curiae:

McClelland & Anderson, LLP (by *Gregory L. McClelland* and *David E. Pierson*), for the Michigan Association of Home Builders.

Dilley Haney, P.C. (by *Troy W. Haney*), and *Law Offices of Robert June, P.C.* (by *Robert B. June*), for the Michigan House Democratic Caucus.

Before: WHITE, P.J., and ZAHRA and KELLY, JJ.

WHITE, P.J. In this action for a declaratory judgment, defendant, Commissioner of the Office of Financial and Insurance Services (OFIS), appeals as of right the circuit court's opinion and order granting a permanent injunction to plaintiffs and intervening plaintiffs. The circuit court declared certain administrative rules (rules) promulgated by defendant commissioner illegal, invalid, and unenforceable, and permanently enjoined defendant from enforcing the rules against any plaintiff or intervening plaintiff in the action. The members of this panel have come to different conclusions regarding the issues presented, and have written three separate opinions. Because Judge KELLY concludes that the circuit court erred in permitting plaintiffs to maintain an original action and would vacate the circuit court's order on that basis, and I conclude that the circuit court erred in failing to base its review on the administrative record, and in accepting additional evidence, and further erred in its conclusions on the merits, at least with regard to insurance issued under chapter 21 of the Insurance Code, this Court vacates the circuit court's order granting a permanent injunction and declaring defendant's rules illegal, unenforceable, and void, and lifts the stay imposed on defendant commissioner's enforcement of the rules.

I

A significant issue facing defendant commissioner when she assumed office in April 2003 was the use by

insurance companies of credit report scores in setting policyholder rates (referred to as "insurance scoring").[1]

[1] The practice of insurance scoring is explained in the report of the OFIS defendant submitted to the Legislature's Joint Committee on Administrative Rules, referred to later in this opinion:

> 2. Purpose for the proposed rules and background:
>
> Over the past five or more years, insurers in Michigan have gradually implemented a rating system for private passenger automobile, home, and other personal lines of insurance that classifies or rates consumers in part by use of information contained in the consumer's credit report. Through data calls, filings, public hearings, consumer complaints, and research on this subject, the Office of Financial and Insurance Services (OFIS) has gathered information that establishes that Michigan insurers have increased their base rates over the same period of time in part to provide a discount or tiers of discounts for consumers with particular insurance credit scores or a particular score within a range of insurance credit scores. Insurers arrive at insurance credit scores by applying to the consumer's credit report or credit information a model or formula either developed in house or purchased from Fair Isaac, ChoicePoint, or another vendor. Insurers usually secure the consumer's credit report from one of the three major consumer reporting agencies—TransUnion, Experion [sic], or Equifax—though insurers may also consult other, smaller consumer reporting agencies for information. Each insurance company factors credit information into its classification system and may use different credit factors or attach different weights to different credit factors when rating for automobile, home, or other personal lines policies. To arrive at the premium charged an individual consumer, generally insurers use a "good" credit score to grant a larger percentage "discount" from the base rate, while a "poor" credit score results in a much smaller discount or no discount at all from the base rate.
>
> The consumer typically receives a premium notice or quote stating that credit information has been used in arriving at the premium and referring the consumer to a toll-free telephone number for the consumer reporting agency that supplied the credit report. A consumer questioning the premium charged must secure his or her credit report, check it for accuracy, dispute any inaccuracies, and upon getting an error corrected, then request the insurer to refigure the premium charged, all without access to the

Defendant's predecessor, Commissioner Frank M.

particular scoring model used by the insurer. Consumers with poor credit and consumers without current credit records—often the young and the old but also many other people who for one reason or another do not choose to borrow money at all or do not borrow from lenders who report to credit reporting agencies—find themselves charged more for automobile, home, or other personal lines of insurance because they do not qualify for any "good credit" discount. Additionally, in selling group coverage, some insurers impose a surcharge on persons with low insurance credit scores.

The purposes of [the] Essential Insurance [Act] are identified in the title to the Insurance Code of 1956, 1956 PA 218, MCL 500.100 et seq. (Insurance Code), as follows:

". . to provide for the continued availability and affordability of automobile insurance and home insurance in this state and to facilitate the purchase of that insurance by all residents of the state at fair and reasonable rates."

Insurance Credit Scoring is being used in rates filed under the Essential Insurance Act, Chapter 21 of the Insurance Code, MCL 500.2101 to 500.2131 (applicable to individual automobile and home insurance); Chapter 24 . . . for casualty policies, MCL 500.2400 to 500.2484 (applicable to group automobile and home insurance and the other personal lines covering mobile homes, rental properties, recreational vehicles, motorcycles, and boats); and Chapter 26 . . . for property policies, MCL 500.2600 to 500.2674 (applicable to group home insurance and the other personal lines also subject to Chapter 24). Since Michigan is a "file and use" state, insurers file their classifications and rates and begin to use them, without prior approval of the Commissioner. MCL 500.2106, MCL 500.2430, MCL 500.2628.

MCL 500.2109 requires that rates for automobile and home insurance "shall not be excessive, inadequate, or unfairly discriminatory;" and MCL 500.2109(1)(c) provides:

"A rate for a coverage is unfairly discriminatory in relation to another rate for the same coverage if the differential between the rates is not reasonably justified by differences in losses, expenses, or both, or by difference in the uncertainty of loss, for the individuals or risks to which the rates apply. A reasonable justification shall be supported by a reasonable classification system; by sound actuarial principles when applicable; and by actual and

Fitzgerald, had addressed the issue by conducting a

> credible loss and expense statistics or, in the case of new coverages and classifications, by reasonably anticipated loss and expense experience."
>
> The same standard for "unfairly discriminatory" appears verbatim in Chapter 24, MCL 500.2403(1)(d), and in Chapter 26, MCL 500.2603(1)(d), for group automobile, group home, and other personal lines subject to those chapters. . . .
>
> Except for those companies exempt under MCL 500.2129, Michigan does not allow the use of insurance credit scoring to refuse to write an individual or group automobile or home policy, cancel a policy, or non-renew a policy. MCL 500.2117 (home), MCL 500.2118 (automobile), MCL 500.2105 (group).
>
> MCL 500.2111 provides an exclusive list of the classifications or rating factors an automobile insurer and a home insurer may use, with the proviso in subsection (9) that an insurer may use additional factors only if the Commissioner finds, after an Administrative Procedures Act contested case hearing that the factors "would encourage innovation, would encourage insureds to minimize the risk of loss from hazards insured against, and would be consistent with the purposes of this chapter." Insurance credit scoring is not among the factors specified in MCL 500.2111, and no automobile or home insurer has requested of the Commissioner a contested case hearing and an opportunity to prove that insurance credit scoring meets the quoted requirements of subsection (9).
>
> MCL 500.2110a is the only statutory provision possibly justifying or authorizing the use of insurance credit scoring in Michigan. It states:
>
> "If uniformly applied to all its insureds, an insurer may establish and maintain a premium discount plan utilizing factors in addition to those permitted by section 2111 for insurance if the plan is consistent with the purposes of this act and reflects reasonably anticipated reductions in losses or expenses. . . ."
>
> Under this section, the premium discount plan must be uniformly applied, be consistent with the purposes of the act, and reflect reasonably anticipated **reductions** in losses or expenses. Insurers typically grant premium discounts for safety equipment such as anti-lock breaks [sic], smoke alarms, or security systems, i.e.[,] items the presence of which might actually reduce losses.

review of insurance scoring and issuing a bulletin on February 14, 2003, "directing insurers to take eight specific actions to comply with the above statutes if they chose to continue using insurance credit scoring."

As a result of an increase in consumer complaints, defendant conducted another review of insurance scoring, and ultimately decided to address the practice by proposing administrative rules. Defendant held four public hearings in July 2004; 418 persons attended and more than 800 persons submitted written comment (an unprecedented number in the OFIS's history, according to defendant). A number of insurance industry representatives testified at the hearings or submitted written documentation.

On October 1, 2004, after the four public hearings, defendant submitted the proposed rules to the Office of Regulatory Reform (ORR)[2] along with the OFIS report. The ORR certified that the proposed rules were legal on January 4, 2005. Defendant formally adopted the rules on January 18, 2005. The Michigan Legislature's Joint Committee on Administrative Rules sent Governor Jennifer M. Granholm a notice of objection to the proposed

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> Though business and industry arguing for the use of insurance credit scoring invariably assert a correlation between low credit scores and increased frequency of claims and occasionally extrapolate that correlation to another claimed correlation between low credit scores and the increased cost of claims, no insurer and or entity conducting studies of credit scoring for insurers has yet to present any data even suggesting, much less proving, that the use of insurance credit scoring results in a **reduction** in losses.
>
> In fact, OFIS has the statements of at least two insurers (who are on record as being opposed to this rule set) in which they admit that the use of insurance credit scoring does not result in a reduction in losses.

[2] The ORR was abolished by Executive Order No. 2005-1, and is now the State Office of Administrative Hearings and Rules.

rules on February 17, 2005, stating that the "[c]ommittee has affirmatively determined by a concurrent majority vote that" (1) the agency is exceeding the statutory scope of its rulemaking authority, (2) the rules are in conflict with the Insurance Code of 1956, and (3) the rules are arbitrary and capricious. However, the Legislature failed to pass legislation preventing implementation of the rules.

The ORR filed the rules with the Secretary of State on March 25, 2005.[3] Plaintiffs filed a complaint for

[3] The rules, Mich Admin Code, R 500.2151 through 500.2155, provided:

R 500.2151 Definitions.

Rule 1. As used in these rules:

(1) "Insurance score" means a number, rating, or grouping of risks that is based in whole or in part on credit information for the purposes of predicting the future loss exposure of an individual applicant or insured.

(2) "Personal insurance" means private passenger automobile, homeowners, motorcycle, boat, personal watercraft, snowmobile, recreational vehicle, mobile-homeowners and non-commercial dwelling fire insurance policies. "Personal insurance" only includes policies underwritten on an individual or group basis for personal, family, or household use.

R 500.2152 Scope.

Rule 2. These rules apply to personal insurance.

R 500.2153 Use prohibited.

Rule 3. (1) For new or renewal policies effective on and after July 1, 2005, an insurer in the conduct of its business or activities shall not use an insurance score as a rating factor.

(2) For new and renewal policies effective on and after July 1, 2005, an insurer in the conduct of its business or activities shall not use an insurance score as a basis to refuse to insure, refuse to continue to insure, or limit coverage available.

declaratory and injunctive relief on March 29, 2005, challenging the validity of the rules, and a motion for a preliminary injunction. The proposed intervenors, Michigan Insurance Coalition and Citizens Insurance Company of America, joined in plaintiffs' motion for a preliminary injunction and filed a motion to intervene as party plaintiffs. The parties stipulated their intervention.[4]

R 500.2154 Filing requirements.

Rule 4. (1) For new and renewal policies effective on or after July 1, 2005, an insurer shall adjust base rates in the following manner:

(a) Calculate the sum of earned premium at current rate level for the period January 1, 2004 through December 31, 2004.

(b) Calculate the sum of earned premium at current rate level with all insurance score discounts eliminated for the period January 1, 2004 through December 31, 2004.

(c) Reduce base rates by the factor created from the difference of the number 1 and the ratio of the amount of subdivision (a) to the amount of subdivision (b).

(2) The insurer shall file with the commissioner a certification that it has made the base rate adjustment and documentation describing the calculation of the base rates adjustment. The insurer shall file the certificate and documentation not later than May 1, 2005.

R 500.2155 Failure to make required filing.

Rule 5. If an insurer fails to make the filing required under R 500.2154, in any proceeding challenging a related rate filing, then the insurer shall be subject to the presumption that the rate filing does not conform to rate standards.

[4] Defendant commissioner filed a motion for change of venue, asserting that Ingham, not Barry, County was the proper venue because defendant's principal office is in, and the cause of action arose in, Ingham County. The circuit court denied the motion to change venue and took plaintiffs' motion for an injunction under advisement.

The circuit court's opinion and order granting a permanent injunction held the rules illegal, invalid, and unenforceable and permanently enjoined defendant from enforcing them, stating, in part:

> All parties were given an opportunity to present evidence at the hearing on the Plaintiffs' motion for preliminary injunction on April 15, 2005. The Defendant indicated it did not contest the factual statements contained in Plaintiffs' affidavits, stating that Defendant believed them to be irrelevant. Defendant stated that the records from public hearings conducted by Defendant pursuant to the Administrative Procedures Act were the only relevant evidence the Court should consider.
>
> * * *
>
> The Court declines to review the record of the public hearings for the reason that it consists largely of position statements and opinions which may not be admissible under the rules of evidence, and more importantly because the Court finds it unnecessary to address whether the rules are arbitrary and capricious as alleged in Count 2 of Plaintiffs' complaint. The Court views the dispositive issues before it as questions of the legality of the Defendant's rules, given the Commissioner's rule-making authority.
>
> * * *
>
> Implementation of the OFIS rules would cause irreparable loss to Plaintiffs because Plaintiffs would incur the expenditure of millions of dollars in unrecoverable implementation costs and also because they would cause disruption of the entire casualty insurance market in the State of Michigan.
>
> IT IS ORDERED that Plaintiffs' request for declaratory relief is granted, and the OFIS rules, R 500.2151-2155 are declared illegal, invalid, and unenforceable.
>
> IT IS FURTHER ORDERED that Defendant is permanently enjoined from enforcing these rules against any Plaintiff in this action.

II

Defendant asserts that the validity of the OFIS rules may only be reviewed by petition for judicial review in the manner provided by § 101 of the Administrative Procedures Act (APA), MCL 24.301, and that under § 104 of the APA, MCL 24.304, such review is confined to the agency record. Thus, defendant maintains, the circuit court erred in entertaining plaintiffs' original action and, additionally, in refusing to consider the agency record. Defendant further asserts that even if an original action were proper, plaintiffs nevertheless failed to comply with the requirement of MCL 24.264 that a plaintiff first request a declaratory ruling from the agency. Notwithstanding the foregoing arguments, however, defendant asserts that although the circuit court erred in entertaining the action and in refusing to consider the agency record, this Court, nevertheless, should address the substantive issues and reverse the determination that the rules are invalid.

Plaintiffs assert that MCL 500.244(1) does not provide an exclusive procedure or remedy for challenging the validity and legality of the rules and that an original action under MCL 24.264 was proper because no judicial or quasi-judicial function was involved; rather, defendant was acting in a quasi-legislative capacity in promulgating the rules. Further, there is no need to request a declaratory ruling where the validity, rather than the applicability, of rules is at issue.

A

MCL 24.264 (§ 64 of chapter 3 of the APA) addresses declaratory judgment actions regarding the validity or applicability of administrative rules and provides:

> *Unless an exclusive procedure or remedy is provided by a statute governing the agency,* the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his principal place of business in this state or in the circuit court for Ingham County. The agency shall be made a party to the action. *An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously.* This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted. [Emphasis added.]

Section 244(1) of the Insurance Code, MCL 500.244(1), provides:

> A person aggrieved by a final order, decision, finding, ruling, opinion, *rule*, action, or inaction provided for under this act may seek judicial review in the manner provided for in chapter 6 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.301 to 24.306. [Emphasis added.]

Chapter 6 of the APA provides, in pertinent part:

> When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for

> review of such action if review of the agency's final decision or order would not provide an adequate remedy. [MCL 24.301.]
>
> Judicial review of a final decision or order in a contested case shall be by any applicable special statutory review proceeding in any court specified by statute and in accordance with the general court rules. In the absence or inadequacy thereof, judicial review shall be by a petition for review in accordance with [MCL 24.303 to 24.305]. [MCL 24.302.]
>
> Except as provided in subsection (2), a petition for review shall be filed in the circuit court for the county where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham county. [MCL 24.303(1).]
>
> The review shall be conducted by the court without a jury *and shall be confined to the record*. In a case of alleged irregularity in procedure before the agency, not shown in the record,[5] proof thereof may be taken by the court. The court, on request, shall hear oral arguments and receive written briefs. [MCL 24.304(3) (emphasis added).]

B

In *Northwestern Nat'l Cas Co v Comm'r of Ins,* 231 Mich App 483, 495-496; 586 NW2d 563 (1998) (*Northwestern*), this Court held that MCL 500.244(1) establishes the exclusive procedure for challenging the insurance commissioner's decisions. The plaintiff insurance companies had challenged an administrative decision of the insurance commissioner rejecting their applications for requalification by filing both a petition for review under MCL 500.244 and chapter 6 of the APA and an original action in the circuit court. The circuit court dismissed the original action, concluding that the plain-

[5] Plaintiffs did not allege any such irregularity.

tiff insurance companies were limited to a petition for review. This Court affirmed, noting:

> The commissioner's decisions may be challenged only as provided in the Insurance Code, i.e., "in the manner provided for in chapter 6 of the administrative procedures act . . . ." MCL 500.244(1); MSA 24.1244(1). Under the APA, administrative decisions are "subject to *direct review* by the courts as provided by law." MCL 24.301; MSA 3.560(201) (emphasis added). Review is to be sought by filing a petition for review, MCL 24.302; MSA 3.560(202), in the circuit court, MCL 24.303(1); MSA 3.560(203)(1), within sixty days of the date when the agency's decision was mailed, MCL 24.304(1); MSA 3.560(204)(1). Clearly, an independent action attacking the agency's decision is not contemplated. [*Northwestern, supra* at 495-496 (footnote omitted).]

In the instant case, plaintiff insurers contend that *Northwestern* involved an "adjudicatory" action, while this case involves a "legislative" action, so *Northwestern* does not control. In *Bio-Magnetic Resonance, Inc v Dep't of Pub Health,* 234 Mich App 225, 232 n 7; 593 NW2d 641 (1999), this Court, in passing, referred to *Northwestern* as involving review of agency action that is judicial or quasi-judicial. While *Northwestern* did involve agency action that was judicial or quasi-judicial, the *Northwestern* Court made no such distinction in considering whether an original action could be maintained.

C

My colleagues disagree over whether plaintiffs properly commenced an original action, rather than a petition for review. Judge KELLY, following *Northwestern,* concludes that MCL 500.244(1) provides the exclusive procedure for challenging a rule promulgated by defendant, as well as defendant's other actions and decisions.

Judge ZAHRA agrees with plaintiffs that *Northwestern,* does not decide the question because that case involved a challenge to quasi-judicial action of the insurance commissioner, rather than the validity of a rule. In my view, *Northwestern* stands for the proposition that decisions of the insurance commissioner, even when not the product of a contested case proceeding under chapter 4 of the APA, are still to be reviewed pursuant to the procedure set forth in chapter 6 of the APA—by filing a petition for review in the circuit court—and cannot be challenged by way of an independent action in circuit court, although the standard of review depends on whether a hearing was required. *Northwestern* recognized the distinction between review of agency action that is quasi-legislative, such as rulemaking, and agency action that is quasi-judicial, and that the latter was involved in *Northwestern*, *supra* at 489 n 1, but it did not address whether MCL 500.244 provides the exclusive procedure and remedy for challenging the validity of a rule. Thus, I find *Northwestern* informative, but not controlling, and conclude that our decision should be based on an examination of the statutes themselves.

D

The Legislature referred to the APA throughout the Insurance Code, making the insurance commissioner subject to the act when promulgating rules, imposing penalties, and conducting hearings.[6] Section 64 of the

[6] MCL 500.210 provides:

> The commissioner shall promulgate rules and regulations in addition to those now specifically provided for by statute as he may deem necessary to effectuate the purposes and to execute and enforce the provisions of the insurance laws of this state in accordance with the provisions of Act No. 88 of the Public Acts of

APA, MCL 24.264, the declaratory judgment provision, is found in chapter 3 of the APA, which sets forth the procedures to be followed by an agency in promulgating rules, the procedure for review of rules by the Legislature, the procedures for publishing rules, and the effect of rules filed under these procedures. At the end of chapter 3, the Legislature provided, in § 63, MCL 24.263, that an interested person may seek a declaratory ruling from an agency regarding the applicability of a rule, which ruling is subject to judicial review under chapter 6 of the APA, and, in § 64, that unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment.

Before 1992, § 244 of the Insurance Code, MCL 500.244, provided:

> (1) Any final order or decision made, issued, or executed by the commissioner under this insurance code shall be subject to review, after hearing had before the commissioner or a deputy commissioner without leave by the circuit court of Ingham county or the circuit court of the county in which the principal office in this state of the insurer aggrieved by such order or decision is located, or where the person resides against whom such order is directed.
>
> (2) A petition as of right for the review of such order or decision shall be filed within 30 days . . . . If no such petition for review is filed within the said 30 days, the party

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1943, as amended, being sections 24.71 to 24.80 of the Compiled Laws of 1948, and subject to Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Laws of 1948.

The acts referenced in this section are provisions that have since been repealed and replaced with the Administrative Procedures Act of 1969, MCL 24.201 *et seq*. MCL 24.312 provides that any reference to these acts is deemed to be a reference to the APA of 1969.

> aggrieved shall be deemed to have waived the right to have the merits of the order or decision reviewed, and there shall be no trial of the merits thereof by any court to which application may be made by petition or otherwise. . . .
>
> (3) The cause shall be heard before the said court as a civil case in chancery upon such transcript of the record and such additional evidence as may be offered by any of the parties at the hearing of said cause before the court. It shall be the duty of the court to hear and determine such petition with all convenient speed. . . . The court shall have the jurisdiction to affirm, modify, or to set aside the order or decision of the commissioner and to restrain the enforcement thereof.

Thus, before 1992, a party aggrieved by an order or decision of the insurance commissioner made after a hearing had a right under MCL 500.244(1) to challenge that decision in circuit court. And, in contrast to a petition for review under chapter 6 of the APA, that review was not confined to the record made before the agency. Rather, the case was heard "as a civil case in chancery upon such transcript of the record and such additional evidence as may be offered by any of the parties at the hearing . . . ." MCL 500.244(3).

The 1992 amendment of MCL 500.244 effected a number of changes. First, it eliminated the special procedure for obtaining review of a decision of the insurance commissioner and, instead, provided for review under chapter 6 of the APA. Second, in so doing, it eliminated the right to make a record before the circuit court and provided that review would be confined to the record made before the agency. Third, it eliminated the reference to the decision of the insurance commissioner having been made after a hearing,[7] thus extending the

[7] In *Blue Cross & Blue Shield of Michigan v Comm'r of Ins*, 155 Mich App 723, 729; 400 NW2d 638 (1986), this Court held that review of the

provision to decisions and actions of the insurance commissioner even in cases where a hearing is not required under the Insurance Code.

Under the former version of MCL 500.244(1), an action for declaratory judgment under § 64 of the APA would have been permissible because the Insurance Code, MCL 500.244(1), did not provide an exclusive procedure or remedy for determining whether a rule was applicable or valid. And, were it not for the inclusion of the word "rule" in the present version of MCL 500.244(1), it still would be clear that plaintiffs could properly challenge the validity of the rules by commencing an original action for declaratory judgment under § 64 of the APA. The question is whether the inclusion of "rule" in the actions of the insurance commissioner reviewable by petition for judicial review, and deletion of language confining the section's application to cases in which there has been a hearing, shows a legislative intent to provide that judicial review under chapter 6 of the APA is the exclusive procedure for challenging the validity of a rule, to the exclusion of § 64 of chapter 3 of the APA, which otherwise would be, and had been, applicable. Given the Insurance Code's general incorporation of the provisions of the APA, and specifically the provisions concerning rules, I conclude that the Legislature did not so intend.

MCL 500.244 does not state that a rule may only be challenged by a petition for review under chapter 6 of the APA, and does not explicitly preclude an action for a declaratory judgment under chapter 3 of the APA. On the other hand, it can be argued that having provided for judicial review under chapter 6 for a person aggrieved by a rule of the insurance commissioner, the

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commissioner's decision was not under MCL 500.244(1), but rather under MCL 600.631, because there had been no hearing.

Legislature intended that that procedure be followed exclusively. I agree that none of the other enumerated actions of the commissioner can be reviewed by commencing an independent action in circuit court. But this is not so much because MCL 500.244(1) provides an exclusive means of review as it is because the APA contemplates that agency actions will be reviewed in accordance with the APA when the statute governing the agency so provides, and MCL 500.244(1) so provides. It is a separate question whether an action under § 64 of chapter 3 of the APA is also permissible where applicable by its terms.

I conclude that MCL 500.244(1) does not provide an exclusive remedy or procedure for challenging the validity or legality of a rule. Rather, it provides that a person aggrieved by an action or decision, or even rule, of the insurance commissioner may seek judicial review under chapter 6 of the APA. It does not follow that a person may not seek a declaration that a rule is invalid under chapter 3 of the APA where the underlying statute otherwise incorporates the provisions of chapter 3, as does the Insurance Code. I also observe that MCL 500.244(1) refers to a person *aggrieved* by a final order, decision, finding, ruling, opinion, rule, action, or inaction provided for under the act. Plaintiffs are not aggrieved by the rules because the rules have not yet been applied to them, and they have not yet been subjected to any consequences. If they are not yet aggrieved, any challenge they have is not ripe for a petition for review under chapter 6 of the APA, and must be pursued as an action for a declaratory judgment under § 64 of chapter 3 of the APA. This is consistent with both the Insurance Code and the APA.

E

Having found that an action for a declaratory judgment pursuant to § 64 could properly be maintained, I conclude

that in the instant case, the question whether the validity of the rules could properly be challenged in this manner, rather than by petition for judicial review under chapter 6 of the APA, is largely irrelevant because in either case the standard of review and the record upon which review must be conducted are identical. And, because in either case jurisdiction is in the circuit court,[8] the court could have treated the complaint as a petition for judicial review if it deemed that appropriate.[9] In either case, the court erred by failing to confine its review to the administrative record.

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[8] This action was filed within 60 days of the ORR's filing of the rules with the Secretary of State, although not within 60 days of the commissioner's adopting them. This illustrates the difficulty in applying the chapter 6 judicial review provisions to a challenge to a rule, because an agency's action in promulgating a rule is subject to additional review before the rule is effective, but the time for seeking judicial review is measured from the date of mailing notice of the final decision or action of the agency.

[9] Under § 64, the question arises whether plaintiffs were required to first request a declaratory ruling from defendant before filing an action for a declaratory judgment in circuit court. MCL 24.264, quoted earlier in this opinion, explicitly states that such a request is a necessary precondition to filing an action for a declaratory judgment under that section. On the other hand, Professor Don LeDuc has expressed the view that there is no exhaustion requirement where the validity, rather than the applicability, of rules is at issue. See LeDuc, Michigan Administrative Law, § 8:13, pp 576-577:

> **§ 8:13 Challenges to statutes, orders, and validity of rules**
>
> . . . Section 64 of the Administrative Procedures Act allows the action for declaratory judgment to determine the validity or applicability of a rule. Then, it says that the action under Section 64 cannot be brought unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied or failed to act on the request.
>
> First, the section creates an exhaustion problem only for matters relating to rules, it does not have any reference to the provisions in Section 63 authorizing declaratory rulings as to the

1

The circuit court erred in adjudicating the validity of the rules on the basis of an evidentiary record made before it. This is so without regard to whether an original action or judicial review was the proper avenue for challenging the rules.

Chapter 6 of the APA explicitly provides in MCL 24.304(3) that judicial review under that chapter is confined to the agency record. See also LeDuc, Michigan Administrative Law, § 9.01, p 597:

[Chapter 9: SCOPE OF JUDICIAL REVIEW]

§ 9:01 Scope of chapter

Scope of judicial review addresses the question of how much a court will undertake to substitute its judgment for that of an agency which has made a decision. How much a court will undertake to second-guess an agency is largely controlled by how it gets the case; the scope of review may be established by the Michigan Constitution, the relevant

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applicability of statutes or orders. Those, presumably, may be challenged in an action for declaratory judgment which is not based on Section 64, and which would be subject to the law's limitations on such actions. Since Section 64 only applies to determining the validity or applicability of rules, the language in Section 63 regarding statutes and orders is irrelevant.

Second, Section 63 empowers an agency to issue a declaratory ruling only as to the applicability of a rule, not as to its validity. The reason for this is obvious, an agency is unlikely to find its own rules invalid and those rules are presumed to be valid anyway. Courts will ultimately determine the validity of a rule. Section 64 thus specifically empowers a court to hear an action for a declaratory judgment as to either the validity or applicability of a rule. The exhaustion requirement of Section 64 (requiring resort first to the submission of a declaratory ruling) applies only when a plaintiff wishes to challenge the applicability of a rule to an actual state of facts. Section 63 does not authorize an agency to issue a ruling on the validity of rules, so there is nothing to exhaust.

> underlying statute, the Administrative Procedures Act, and the method of review used to get the case into a court.
>
> In most cases, the scope of review is limited to the record made in the administrative proceeding under judicial challenge. An underlying statute may provide that limitation, as does the Administrative Procedures Act [citing MCL 24.304(3)]. Failure to heed those admonitions results in certain reversal [citing *Roman v Secretary of State,* 213 Mich App 592; 540 NW2d 474 (1995)].[10]

Alternatively, accepting that an original action under § 64 of the APA was proper, the circuit court was still required to base its decision on the administrative record, and was without authority to expand that record. In *Michigan Ass'n of Home Builders v Dep't of Labor & Economic Growth Director*, 481 Mich 496 ; 750 NW2d 593 (2008), our Supreme Court recently held that judicial review of a non-contested case, including a challenge to a rule promulgated after public hearings and challenged under § 64 of the APA, is limited to the administrative record, and the administrative record may not be expanded by a remand to the administrative agency. Additionally, the history of MCL 500.244 makes clear that the Legislature intended to abandon the prior procedure in which circuit courts took additional evidence on appeal in favor of judicial review based exclusively on the agency record. Thus, to the extent the circuit court's decision was based on findings gleaned from the record made before it, rather than the administrative record, the decision should be vacated.

I cannot agree with Judge ZAHRA's conclusion that the circuit court's failure to limit its review to the

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[10] In *Roman*, this Court reversed the circuit court's setting aside of the revocation of the petitioner's driver's license, concluding that judicial review of the Secretary of State's revocation of a driver's license is confined to consideration of the administrative record, which was not provided to the circuit court.

agency record is harmless because plaintiffs assert a purely legal challenge. As discussed later in this opinion, the circuit court's decision was based on conclusions regarding insurance scoring that were based on the record made in the circuit court. This was error.

2

Similarly, the standard governing the judicial determination whether the rules are valid is the same, without regard to the proper form of the challenge. In *Northwestern, supra* at 487-490, this Court discussed the standard of review circuit courts must apply to decisions of the insurance commissioner:

> The Michigan Constitution provides that "[a]ll final decisions . . . of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions . . . are authorized by law; and, *in cases in which a hearing is required*, whether the same are supported by competent, material and substantial evidence on the whole record." Const 1963, art 6, § 28 (emphasis added). Whether "a hearing is required" is determined by reference to the statute governing the particular agency. See *Attorney General v Public Service Comm,* 206 Mich App 290, 293, 295-296; 520 NW2d 636 (1994). "Where no hearing is required, it is not proper for the circuit court *or this Court* to review the evidentiary support of an administrative agency's determination." *Brandon School Dist v Michigan Ed Special Services Ass'n,* 191 Mich App 257, 263; 477 NW2d 138 (1991) (emphasis added); see also LeDuc, Michigan Administrative Law, § 9:02, p 5. In such cases, "[j]udicial review is not de novo and is limited in scope to a determination whether the action of the agency was authorized by law." *Brandon, supra* at 263.

There is apparently much confusion regarding the meaning of this constitutional standard, whether an agency's decision is authorized by law. See LeDuc, § 9.05, pp 9-10. We agree that, in plain English, authorized by law means allowed, permitted, or empowered by law. Black's Law Dictionary (5th ed). Therefore, it seems clear that an agency's decision that "is in violation of statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious," is a decision that is *not* authorized by law. *Brandon, supra* at 263. We recognize that this interpretation is almost identical to the standards set out in the Administrative Procedures Act (APA). See MCL 24.306(1) . . . ; see also LeDuc (1998 supp), § 9:01, p 128. However, we find that is also a reasonable articulation of the constitutional standard because it focuses on the agency's power and authority to act rather than on the objective correctness of its decision. We therefore adopt the *Brandon* Court's formulation of whether an agency's decision is authorized by law.

As noted by the parties, the Insurance Code provides that "[a] person aggrieved by a final order, decision, finding, ruling, opinion, rule, action, or inaction provided for under this act may seek judicial review *in the manner provided for* in chapter 6 of the [APA]." MCL 500.244(1) . . . (emphasis added). The APA normally provides review only from decisions and orders in contested cases. See MCL 24.301 . . . ; see also *Martin v Stine,* 214 Mich App 403, 409-410; 542 NW2d 884 (1995). As discussed above, the APA's standards of review coincide with the authorized-by-law standard provided in the constitution, but the APA also allows an agency's decision to be set aside if it is "[n]ot supported by competent, material and substantial evidence on the whole record" or if it is "[a]ffected by other substantial and material error of law." MCL 24.306(1)(d) and (f) . . . .

We agree with the commissioner that the Insurance Code incorporates only the procedure provided in the APA and not its standards of review. . . . Therefore, in the present case, because no contested hearing was required or

> held, the proper standard of review was that set out in Const 1963, art 6, § 28 and explained in *Brandon,* not the substantial evidence test or the substantial and material error of law test. [Emphasis in original.]

Northwestern involved agency action that was judicial or quasi-judicial, and not legislative or quasi-legislative. It is an open question whether Const 1963, art 6, § 28, even applies to quasi-legislative administrative actions. See *Luttrell v Dep't of Corrections*, 421 Mich 93, 108-109; 365 NW2d 74 (1984) (RYAN, J., concurring). However, whether constitutionally required or not, this Court has applied a similar test when reviewing an agency's rulemaking activity. In *Chesapeake & O R Co v Pub Service Comm*, 59 Mich App 88, 98-99; 228 NW2d 843 (1975), this Court applied a test that is similar to the *Brandon* test, stating:

> Where an agency is empowered to make rules, courts employ a three-fold test to determine the validity of the rules it promulgates: (1) whether the rule is within the matter covered by the enabling statute; (2) if so, whether it complies with the underlying legislative intent; and (3) if it meets the first two requirements, when [sic] it is neither arbitrary nor capricious.

The *Brandon* and *Chesapeake* tests provide for more expansive judicial review than if Const 1963, art 6, § 28, does not apply. In any event, the rules can be subject to no greater judicial scrutiny than provided in *Brandon* and *Chesapeake*.

III

Judge KELLY does not reach the merits of the circuit court's decision. Judge ZAHRA concludes that the circuit court correctly concluded that defendant exceeded her rulemaking authority under the Insurance Code. I conclude that the rules pass muster as applied to

insurance issued under chapter 21 of the Insurance Code. With respect to insurance issued under chapters 24 and 26, I would vacate the circuit court's order and remand for review based on the administrative record. I separately apply the *Brandon* test to the two groups of insurance.

A

Defendant has statutory authority to "promulgate rules and regulations . . . as [she] may deem necessary to effectuate the purposes and to execute and enforce the provisions of the insurance laws of this state in accordance with the provisions of [the APA]." MCL 500.210. The rules are within the matter covered by the enabling statute. Further, the rules were promulgated pursuant to lawful procedures as set forth in the APA. This conclusion applies to insurance under all three chapters.

B

Plaintiffs assert that the rules are in excess of defendant's statutory authority, and are contrary to the legislative intent because they disallow rates without a prior hearing as required by MCL 500.2114, 500.2418, and 500.2618. The circuit court and Judge ZAHRA agree. I reject this argument because defendant concedes that plaintiffs are entitled to contested case hearings if they file rates that are not in compliance with the rules and if defendant disallows the rates on that basis. Admittedly, the hearing would be somewhat limited if the rules are found valid in these proceedings. However, plaintiffs could have eschewed a direct, declaratory challenge to the rules under § 64, and simply filed rates in conflict with the rules. Defendant would then have been obliged to initiate hearings under MCL 500.2114(2). I do not agree with Judge ZAHRA's conclusion that the substance of such hearings would be

confined to the question whether the rates comply with the rules. Rather, I believe the validity of the rules would be subject to challenge in the contested case proceeding. Thus, the only reason the rules have the effect of disallowing rates without a contested case hearing is that plaintiffs chose to preempt application of the rules by challenging them directly. Had they not commenced this proceeding, they would have been free to challenge the validity of the rules in contested case proceedings addressed to the question whether the filed rates meet the requirements of §§ 2109 and 2111 of the Insurance Code, MCL 500.2109 and 500.2111. Thus, I do not agree that the rules impermissibly invalidate rates without a meaningful contested case hearing.

Further, MCL 500.2114, 500.2418, and 500.2618, which provide for contested case hearings where rates are disallowed, are not inconsistent with a conclusion that defendant has authority under MCL 500.210 to conduct public hearings and promulgate rules announcing a conclusion that a certain rating factor or practice violates the Insurance Code, and that insurers should take certain specific actions in order to comply with the Insurance Code in the future. All that is required is that the rules so promulgated be within the statutory authority or jurisdiction of the agency, be made upon lawful procedures, be consistent with the Insurance Code, and not be arbitrary or capricious. Insurers retain the right to file rates in conflict with any such rules and to both defend the rates under the rules and challenge the rules as being invalid in contested case hearings. Thus, I cannot agree with Judge ZAHRA's conclusion that the Insurance Code prohibits the promulgation of rules that affect rates prospectively.[11]

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[11] I must disagree with Judge ZAHRA's assertion that "[i]n no uncertain terms, the OFIS rules, if deemed valid, would render invalid existing

C

Plaintiffs assert, and the circuit court agreed, that the rules impermissibly lower rates without a finding, as required by MCL 500.2109 and MCL 500.2403, that the rates are excessive. However, the rules simply disallow insurance scoring and provide a formula by which an insurer can satisfy defendant that its rates have been properly adjusted to eliminate the effects of insurance scoring. Plaintiffs have conceded that when the formula is applied, the same total amount of premium dollars is collected; but the premium cost is allocated differently among the insureds. This is not a reduction in rates, but rather a reallocation in premium cost on the basis of the disallowance of a rating factor. Thus, I reject this argument as it relates to insurance issued under all three chapters.

D

Plaintiffs also argue that the rules are contrary to statute and legislative intent because they disallow rates that are in compliance with the Insurance Code. I disagree with regard to insurance governed by chapter 21.

MCL 500.2109, 500.2110, and 500.2111 clearly set forth the rating factors that can be used for automobile and home insurance. Insurance scoring is not among them. Further, the procedure for authorizing the utilization of additional factors set forth in MCL 500.2111(9) was not followed. Plaintiffs assert that

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rate filings for all insurers who use insurance scoring to determine their rates." *Post* at 378. By their express terms, the rules have no effect on existing rates, and operate prospectively only. While future rates may be invalidated by the rules, the onus is still on defendant to invalidate any rates that conflict with the rules.

insurance scoring is permissible under MCL 500.2110a, which provides, in pertinent part:

> If uniformly applied to all its insureds, an insurer may establish and maintain a premium discount plan utilizing factors in addition to those permitted by section 2111 for insurance if the plan is consistent with the purposes of this act and reflects reasonably anticipated reductions in losses or expenses.

Defendant asserts, and I agree, that insurance scoring is not a premium discount plan as contemplated by MCL 500.2110a because it does not reflect "reasonably anticipated reductions in losses or expenses." The discount is not given because the insured has taken action, such as purchasing airbags or a theft-deterrent system, which may reduce the insured's losses. Rather, the discount is provided because the insurer has determined that certain characteristics of the insured make it more likely that the insured will make fewer or less costly claims. Pivotal to defendant's reasoning is the fact that with insurance scoring the total amount of premiums collected, and losses paid, remains the same; the base rates are simply adjusted upward to allow plaintiffs to grant discounts, or larger discounts, to those with better insurance scores. The premium cost is thereby shifted from persons with better insurance scores to persons with poorer insurance scores. This is clearly an unapproved rating factor, not a discount. Defendant's construction of MCL 500.2110a is not contrary to law or legislative intent. Further, as applied to insurance issued under chapter 21, the rules reflect a determination that insurance scoring is neither a permissible rating factor under the statute nor a permissible discount. This determination is neither arbitrary nor capricious. I thus conclude that with regard to insurance issued under chapter 21, the circuit court

erred in concluding that the rules are illegal, invalid, and unenforceable because they are beyond defendant's rulemaking authority.

E

Regarding insurance issued under chapter 24, MCL 500.2426 provides:

> No manual of classifications, rule, rating plan, or any modification of any of the foregoing which measures variations in hazards or expense provisions, or both, and which has been filed pursuant to the requirements of this chapter shall be disapproved if the rates thereby produced meet the requirements of section 2403(1)(d) (rate standards).

Regarding insurance issued under chapter 26, MCL 500.2626 provides:

> No manual, minimum, class rate, rating schedule, rating plan, rating rule, or any modification of any of the foregoing which has been filed pursuant to the requirements of [this chapter] shall be disapproved if the rates thereby produced meet the requirements of this chapter.

Sections 2426 and 2626 include the "unfairly discriminatory" standard, which provides:

> Rates shall not be excessive, inadequate, or unfairly discriminatory. A rate shall not be held to be excessive unless the rate is unreasonably high for the insurance coverage provided and a reasonable degree of competition does not exist with respect to the classification, kind, or type of risks to which the rate is applicable. . . . A rate for a coverage is unfairly discriminatory in relation to another rate for the same coverage, if the differential between the rates is not reasonably justified by differences in losses, expenses, or both, or by differences in the uncertainty of loss for the individuals or risks to which the rates apply. A reasonable justification shall be supported by a reasonable classification system; by sound actuarial principles when

> applicable; and by actual and credible loss and expense statistics or, in the case of new coverages and classifications, by reasonably anticipated loss and expense experience. A rate is not unfairly discriminatory because the rate reflects differences in expenses for individuals or risks with similar anticipated losses, or because the rate reflects differences in losses for individuals or risks with similar expenses. Rates are not unfairly discriminatory if they are averaged broadly among persons insured on a group, franchise, blanket policy, or similar basis. [MCL 500.2403(1)(d); MCL 500.2603(1)(d).]

Plaintiffs argue, and the circuit court found, that the rules are in excess of defendant's authority because they invalidate rates that otherwise comply with the provisions of chapters 24 and 26, in violation of §§ 2426 and 2626. Defendant asserts that the rules are authorized because they are based on a finding that insurance scoring results in rates that are unfairly discriminatory.

Defendant based the rules on conclusions drawn from her review of the insurance scoring practices of the industry and the hearings held to elicit and consider the responses to her conclusions and proposed rules based thereon. Defendant found that that the underlying data and the operative formulas used by insurance companies are often inaccurate and inconsistent, that consumers are not provided with enough information to question the scoring and resulting premiums, and that the studies relied on by the industry are inadequate and unpersuasive. The circuit court refused to review this determination on the basis of the agency record, stating:

> The Court declines to review the record of the public hearings for the reason that it consists largely of position statements and opinions which may not be admissible under the rules of evidence, and more importantly because the Court finds it unnecessary to address whether the rules are arbitrary and capricious as alleged in Count 2 of

> Plaintiffs' complaint. The Court views the dispositive issues before it as questions of the legality of the Defendant's rules, given the Commissioner's rule-making authority.

While the circuit court framed the question as a purely legal one, its conclusion that the rules are invalid because they exceed defendant's statutory authority was based on factual conclusions that were based solely on the record made in the circuit court, and which ignored the agency record. The court found as fact that insurance scores accurately reflect differences in risk:

> The Defendant disputes the notion that those with better insurance scores present lower insurance risks and lower insurance costs, but the evidence presented establishes a strong correlation between insurance scores and risk of loss and expenses.
>
> * * *
>
> The evidence clearly establishes that, on average, a policyholder with a higher insurance score presents a lower risk and lower expense (due to lower number of claims) than a policyholder with a lower insurance score.

On the basis of this factual finding, the circuit court concluded that the rules are invalid because they disallow rate filings that otherwise comport with the statute:

> Since rating plans utilizing insurance scores measure differences in risk that have a probable effect on losses or expenses, such plans are clearly authorized by the Insurance Code. MCL 500.2403(1)(c); 500.2603(1)(c). The statutory language only requires a probable effect on losses or expenses. The industry's experience clearly shows an actual effect on losses and expenses.
>
> The Commissioner clearly lacks any authority to adopt a rule banning the use of insurance scores because the Insurance Code states that no rating plan shall be disapproved if the rates meet these rate standard requirements. MCL 500.2426; 500.2626. [Emphasis in original.]

Thus, the circuit court's conclusion that insurance scoring meets the rate standard requirements of MCL 500.2403 and 500.2603 was based on its rejection of defendant's conclusions drawn from the administrative record and its adoption of its own conclusions drawn from the evidence submitted in this action. As discussed earlier, the circuit court was obliged to confine its review to the administrative record. *Michigan Ass'n of Home Builders, supra.*

CONCLUSION

I would reverse the circuit court's order and injunction with regard to insurance issued under chapter 21, vacate the circuit court's order and injunction with regard to insurance issued under chapters 24 and 26, and remand for proceedings consistent with this opinion concerning such insurance.[12]

The order and injunction of the circuit court should be vacated and the stay imposed on enforcement of the rules should be lifted. I would not retain jurisdiction.

ZAHRA, J. (*concurring in part and dissenting in part*). This case presents challenging issues of administrative and insurance law over which this panel has struggled, as shown by the fact that we resolve this appeal by

[12] I observe, however, that both plaintiffs and defendant recognize the value of a contested case in determining to what extent, under what conditions, and with respect to which insurance coverages insurance scores accurately reflect differences in losses and expenses. I note that if defendant were to confine the rules to insurance issued under chapter 21, she could challenge the use of insurance scoring under chapters 24 and 26 through contested case proceedings in accordance with the provisions regarding the disapproval of filings under those chapters. Similarly, in lieu of this challenge to the rules in an action for a declaratory judgment, plaintiffs could seek to establish their illegality in contested case hearings in the defense of their rates when challenged by defendant.

issuing three opinions—a very rare occurrence in this Court. I respectfully dissent from the decision to vacate the opinion and order of the lower court. I conclude that the lower court properly entertained plaintiffs' original action challenging the legality of the Office of Financial and Insurance Services (OFIS) rules. While I agree that the lower court erred in rejecting the record created by the OFIS and by creating its own record, I nonetheless conclude that this error was harmless because the issue resolved by the lower court was a purely legal question—i.e., whether the OFIS exceeded its statutory authority in promulgating the rules that are the subject of this litigation. I conclude as a matter of law that the OFIS exceeded its statutory authority in promulgating its administrative rules and, thus, the lower court properly concluded that these rules are illegal and invalid. I would affirm the opinion and order of the lower court.

I. PLAINTIFFS PROPERLY ASSERTED AN ORIGINAL ACTION PURSUANT TO § 64 OF CHAPTER 3 OF THE ADMINISTRATIVE PROCEDURES ACT, MCL 24.264, TO CONTEST THE VALIDITY OF RULES PROMULGATED BY THE OFIS

A. MCL 500.244(1) DOES NOT LIMIT PLAINTIFFS' REMEDY TO AN ACTION UNDER CHAPTER 6 OF THE APA

I agree with Judge WHITE that MCL 500.244(1) does not bar plaintiffs from asserting a challenge to the validity of the OFIS rules under chapter 3 of the Administrative Procedures Act (APA). Section 244(1) of the Insurance Code, MCL 500.244(1), provides that "[a] person aggrieved by a final order, decision, finding, ruling, opinion, rule, action or inaction provided for under this act may seek judicial review in the manner provided for in chapter 6 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.301 to 24.306."

Initially, I find that use of the word "may" to describe the availability of judicial review does not, in and of itself, compel the conclusion that the Legislature did not intend an action under chapter 6 of the APA to be the exclusive remedy available to plaintiffs. A person aggrieved by a rule may elect to seek judicial review or may elect to not seek judicial review. The exclusivity of a review process is independent of an aggrieved party's determination whether to pursue a remedy. See *Rinas v Mercer,* 259 Mich App 63, 69; 672 NW2d 542 (2003) (mandatory language cannot be used to address conduct that is elective). However, the absence of express language directing that this remedy be an exclusive one is, in my opinion, dispositive of this question. A plain reading of § 244(1) supports plaintiffs' position. Had the Legislature intended § 244(1) to define an exclusive remedy, it would have expressly stated its conclusion. For example, the Legislature could have simply added the words "the exclusive remedy for" at the beginning of § 244(1) and replaced the words "may seek" with the words "is limited to" and there would be no question that the Legislature intended this section to provide the exclusive remedy available to plaintiffs.

The Legislature has demonstrated in other areas of the law its willingness to use clear and unambiguous language to establish exclusive remedies. See MCL 418.131(1) (workers' compensation exclusive remedy provision); MCL 211.78k (General Property Tax Act review provision). The Legislature's choice of the permissive term "may," coupled with its choice to exclude definitive and mandatory language expressly establishing the remedy provided in § 244(1) as an exclusive remedy, supports the conclusion that § 244(1) of the Insurance Code does not define the exclusive remedy available to a party challenging the validity of a rule promulgated by the OFIS.

Further, the language of chapter 6 of the APA indicates that it is the preferred vehicle for review of "contested cases," as that term is defined in the APA. MCL 24.203(3); see also MCL 24.301 to MCL 24.306. A challenge to the validity of a rule, however, is not accomplished through contested case proceedings. *Michigan Ass'n of Home Builders v Dep't of Labor & Economic Growth Director,* 481 Mich 496; 750 NW2d 593 (2008). Thus, the remedy provided in § 244(1) of the Insurance Code does not define the exclusive remedy available to a party when challenging the validity of a rule promulgated by the OFIS.

Judge KELLY relies on *Northwestern Nat'l Cas Co v Comm'r of Ins,* 231 Mich App 483; 586 NW2d 563 (1998), to support the conclusion that § 244(1) of the Insurance Code limits challenges to the validity of administrative rules to a petition for review. In *Northwestern Nat'l Cas*, two insurance companies appealed an administrative ruling made by the insurance commissioner by filing both a petition for review under § 244(1) of the Insurance Code, MCL 500.244(1), and an original action in the circuit court. The circuit court dismissed the original action, concluding that the insurance companies were limited to a petition for review under § 244(1). This Court affirmed.

Northwestern Nat'l Cas is distinguishable primarily because it arose from the exercise of quasi-judicial adjudicative functions of the OFIS, i.e., an action addressing the OFIS commissioner's interpretation and application of administrative rules. By contrast, this case involves a challenge to the "legislative" powers of the OFIS, i.e., a challenge to the validity of the rules created by the OFIS.[1] This distinction is critical. Defer-

[1] In *Bio-Magnetic Resonance, Inc v Dep't of Pub Health*, 234 Mich App 225, 233 n 7; 593 NW2d 641 (1999), this Court noted that *Northwestern Nat'l Cas* involved a judicial or quasi-judicial agency action.

ence must be given to the adjudicative findings of administrative agencies. *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 588; 701 NW2d 214 (2005). However, the validity of an administrative rule is resolved as a matter of law by the courts. See LeDuc, Michigan Administrative Law, § 8.13, pp 576-577. Consistent with this notion, our Supreme Court recently held that "an agency's interpretation of a statute is entitled to 'respectful consideration,' but courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation. Courts must respect legislative decisions and interpret statutes according to their plain language." *In re Complaint of Rovas Against SBC Michigan,* 482 Mich 90, 93; 754 NW2d 259 (2008). Thus, in reviewing quasi-legislative actions of an administrative agency, there is no sound reason to implement the procedures dictated by chapter 6 of the APA. *Id*.[2]

I also see no merit in the argument that the lower court erred in accepting plaintiffs' original action because § 244(1) of the Insurance Code makes express reference to challenges to a "rule." Where a party contests the application of a rule, review is appropriate by the filing of a contested case under chapter 6 of the APA, as provided in § 244(1) of the Insurance Code. That is not the case here. Again, this action involves a challenge to the validity of the administrative rules, not a challenge to the applicability of them.

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[2] Because *Northwestern Nat'l Cas* is procedurally and factually distinguishable from the present case, I am not troubled by the failure of the panel in *Northwestern Nat'l Cas* to indicate that an original action is proper where, as here, the action seeks to have administrative rules declared invalid, illegal, or unenforceable. The question simply was not before that panel.

B. PLAINTIFFS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES BEFORE SEEKING REVIEW IN THE CIRCUIT COURT PURSUANT TO CHAPTER 3 OF THE APA

Section 64 of chapter 3 of the APA, MCL 24.264, addresses actions for a declaratory judgment to determine the validity of administrative rules and provides:

> Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his principal place of business in this state or in the circuit court for Ingham County. The agency shall be made a party to the action. *An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously.* This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted. [Emphasis added.]

Defendant maintains that plaintiffs cannot pursue this action because plaintiffs did not first request a declaratory ruling from the OFIS. Notwithstanding the express language calling for the exhaustion of administrative remedies before initiating an action for a declaratory judgment, this Court has long recognized an exception to the requirement that a party exhaust administrative remedies before filing suit in the circuit court. See *L & L Wine & Liquor Corp v Liquor Control Comm,* 274 Mich App 354, 358-359; 733 NW2d 107 (2007) (recognizing an exception to the exhaustion requirement where exhaustion before the administrative agency would be futile); *Nalbandian v Progressive*

Michigan Ins Co, 267 Mich App 7, 10 n 2; 703 NW2d 474 (2005) (rejecting the insurer's claim that the plaintiff was required to exhaust administrative remedies because to do so would have been futile); *Susan R Bruley Trust v Birmingham,* 259 Mich App 619, 627; 675 NW2d 910 (2003) (holding that litigants will not be made to pursue an administrative process when only the courts have the authority to resolve the controlling issue); *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 52-54; 620 NW2d 546 (2000) (recognizing the futility exception where exhaustion before the administrative agency would be futile); *Manor House Apartments v City of Warren,* 204 Mich App 603, 605; 516 NW2d 530 (1994) (holding that the taxpayer was not required to exhaust administrative remedies before the Tax Tribunal because such action would have been futile); *Turner v Lansing Twp,* 108 Mich App 103, 108; 310 NW2d 287 (1981) (holding that exhaustion of administrative remedies is not required where it is clear that appeal to an administrative agency is "an exercise in futility and nothing more than a formal step on the way to the courthouse"); *Sterling Secret Service, Inc v Dep't of State Police*, 20 Mich App 502, 511; 174 NW2d 298 (1969) (holding that requiring the plaintiff to utilize the APA to have the defendant revoke its rules "would have been a vain and useless act"). Following this long line of cases, plaintiffs in this case were not required to ask the OFIS to declare its newly enacted rules illegal and invalid. Simply put, to do so would have been "a vain and useless act." *Id.*

I respectfully disagree with Judge KELLY's apparent conclusion that she may ignore the many cases recognizing the futility exception to the requirement that one must exhaust administrative remedies before initiating an action for judicial review under the APA. Many of these cases were decided after November 1, 1990. Thus,

we are bound pursuant to MCR 7.215(J) to follow the many cases recognizing this exception. The inconsistency between the APA and the judicially created futility exception must be resolved, if at all, by a conflict panel of this Court or by our Supreme Court. It is simply beyond the power of this panel to reverse or ignore this well-established doctrine.

Here, the futility in attempting to seek administrative review from the OFIS is obvious. Plaintiffs are challenging the validity of the administrative rules and the OFIS is powerless to pass on the validity of its rules. As noted in LeDuc, Michigan Administrative Law, § 8:13, pp 576-577:

> . . . Section 63 empowers an agency to issue a declaratory ruling only as to the applicability of a rule, not as to its validity. The reason for this is obvious, an agency is unlikely to find its own rules invalid and those rules are presumed to be valid anyway. Courts will ultimately determine the validity of a rule. Section 64 thus specifically empowers a court to hear an action for a declaratory judgment as to either the validity or applicability of a rule. *The exhaustion requirement of Section 64 (requiring resort first to the submission of a declaratory ruling) applies only when a plaintiff wishes to challenge the applicability of a rule to an actual set of facts. Section 63 does not authorize an agency to issue a ruling on the validity of rules, so there is nothing to exhaust.* [Emphasis added.]

Moreover, consistent with Judge WHITE's observation that "[p]laintiffs are not aggrieved by the rules because the rules have not yet been applied to them," *ante* at 351, plaintiffs could not have sought a declaratory ruling from the OFIS. MCL 24.263 controls requests for declaratory rulings from agencies and provides that "[o]n request of an interested person, an agency may issue a declaratory ruling as to the applicability to *an actual state of facts* of a statute administered by the

agency or of a rule or order of the agency." (Emphasis added.) In this regard, I agree with *Michigan Ass'n of Home Builders v Director of Dep't of Labor & Economic Growth*, 276 Mich App 467, 480-481; 741 NW2d 531 (2007), vacated in part on other grounds 481 Mich 496 (2008), in that

> [a] plain reading of MCL 24.263 requires that an interested person have "an actual state of facts" to bring before the agency for its consideration. Here, plaintiff did not have an "actual state of facts" to bring before the [Department of Labor and Economic Growth]. Therefore, plaintiff could not seek a declaratory ruling before seeking judicial relief.

For these reasons, I conclude that plaintiffs were not required to seek review by the OFIS before initiating this action.

II. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE RULES PROMULGATED BY THE OFIS ARE ILLEGAL AND INVALID

A. *MICHIGAN ASS'N OF HOME BUILDERS v DIRECTOR OF DEP'T OF LABOR & ECONOMIC GROWTH*

Preliminarily, I am compelled to address our Supreme Court's recent memorandum opinion in *Michigan Ass'n of Home Builders, supra.* There, our Supreme Court concluded that a circuit court reviewing the validity of rules created by an administrative agency must limit its review to the agency record. In the present case, the circuit court erred because it did not limit its review to the agency record. I nonetheless conclude that this error was harmless, because the circuit court made a purely legal ruling that was not based on any record. Rather, the circuit court's conclusions, as well as my own, are based exclusively on the statutes granting the OFIS its rulemaking authority and the statutes that permit insurers to file and use

rates in Michigan. Here, plaintiffs are asserting a purely legal challenge to the process implemented by the OFIS. For this reason, I conclude that the lower court's error in expanding the record is harmless and does not require reversal.

B. STANDARD OF REVIEW

The standard of review applicable to this case is found in *Chesapeake & O R Co v Pub Service Comm,* 59 Mich App 88, 98-99; 228 NW2d 843 (1975), and was adopted by our Supreme Court in *Luttrell v Dep't of Corrections,* 421 Mich 93, 100; 365 NW2d 74 (1984) (the "*Luttrell* standard"):[3]

> Where an agency is empowered to make rules, courts employ a three-fold test to determine the validity of the rules it promulgates: (1) whether the rule is within the matter covered by the enabling statute; (2) if so, whether it complies with the underlying legislative intent; and (3) if it meets the first two requirements, when [sic] it is neither arbitrary nor capricious.

C. THE ADMINISTRATIVE RULES PROMULGATED BY THE OFIS

The OFIS enacted five administrative rules that, when applied together, prohibit insurers from using insurance scores as a rating factor for the issuance of personal insurance in Michigan. Mich Admin Code, R 500.2151 through 500.2155. The OFIS defined "insurance score" to mean "a number, rating, or grouping of

[3] As an ancillary matter, I agree with the observations of Justice RYAN in his concurring opinion in *Luttrell, supra* at 108-109. There is no authority for the standard of review created in *Chesapeake & O R Co* and embraced by our Supreme Court in *Luttrell*. In my opinion, the validity of rules promulgated by administrative agencies presents a pure legal question that courts ought to review de novo as a matter of law. However, we are bound to accept *Luttrell* until the Supreme Court rules otherwise.

risks that is based in whole or in part on credit information for the purposes of predicting the future loss exposure of an individual applicant or insured." R 500.2151(1). The OFIS required all insurers to adjust their base rates on all personal insurance through the use of a formula that eliminated all insurance score discounts. R 500.2154.

As a result of the implementation of these rules, insurers are required to provide a rate discount to policyholders with lower insurance scores and increase the rates paid by policyholders who have higher insurance scores.

D. THE RULES PROMULGATED BY THE OFIS FAIL TO SATISFY THE *LUTTRELL* STANDARD

In the broadest sense, the rules under review do not offend the first prong of the *Luttrell* standard. MCL 500.210 provides that "[t]he commissioner shall promulgate rules and regulations in addition to those now specifically provided for by statute as [s]he may deem necessary to effectuate the purposes and to execute and enforce the provisions of the insurance laws of this state . . . ." To the extent that the rules challenged by the plaintiffs relate to matters the commissioner deemed necessary to effectuate the insurance laws of Michigan, the rules survive judicial review.

The rules fail the second prong of the *Luttrell* standard because they do not comply with the underlying legislative intent behind the statutes governing insurance rates in Michigan. Courts ascertain and give effect to the Legislature's intent by reviewing the language of the statute under review. *Neal v Wilkes,* 470 Mich 661, 665; 685 NW2d 648 (2004). Courts "must look at the specific statutory language and, if it is ' "clear and unambiguous, judicial construction is neither required

nor permitted, and courts must apply the statute as written." ' " *Diamond v Witherspoon*, 265 Mich App 673, 684; 696 NW2d 770 (2005), quoting *Erb Lumber, Inc v Gidley,* 234 Mich App 387, 392; 594 NW2d 81 (1999), quoting *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996). "Furthermore, 'a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' " *Diamond, supra* at 685, quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

The rules promulgated by the OFIS are inconsistent with the legislative intent as determined from the express language of the ratemaking and rate-review provisions of the Insurance Code because the Michigan Legislature has made it clear that the OFIS cannot (1) invalidate on an industry-wide basis rates that are deemed valid under the process provided in the Insurance Code and (2) order through its rulemaking authority rate reductions without first finding through an administrative hearing that the insurer's rates are excessive.

1. THE OFIS CANNOT INVALIDATE ON AN INDUSTRY-WIDE BASIS RATES THAT ARE DEEMED VALID UNDER THE PROCESS PROVIDED IN THE INSURANCE CODE

The Michigan Legislature has enacted a system that permits Michigan insurance companies to implement their insurance rates without preapproval by the OFIS. For individual home and automobile insurance under chapter 21 of the Insurance Code, insurers may implement their rate plans immediately upon filing them with the OFIS. MCL 500.2106. For casualty and other insurance available under chapter 24 of the Insurance Code and property and other insurance available under

chapter 26 of the Insurance Code, there is a 15-day waiting period between the date rate plans are filed and the date the rate plans may be implemented. MCL 500.2408; MCL 500.2608. If the OFIS fails to disapprove the rate plans or seek an extension of the waiting period within the initial 15-day waiting period, the rate plans are deemed approved and valid. For all rate plans filed under chapter 21 of the Insurance Code and all rate plans that are deemed approved after expiration of the applicable waiting periods under chapters 24 and 26 of the Insurance Code, the OFIS may challenge particular filings only through an administrative hearing against the individual insurer implementing the contested rates. MCL 500.2114, 500.2115, 500.2418, 500.2420, 500.2618, and 500.2620. Thus, the Legislature limited the authority of the OFIS to challenge rates that are implemented pursuant to the legislative process. If the OFIS wants to challenge such rates, it may do so only by initiating an administrative hearing against the insurer whose rate plan is being challenged.

Here, the OFIS has utilized its rulemaking authority to implement an industry-wide prohibition on the use of insurance scoring which, in effect, invalidates otherwise validly filed rate plans for insurers across Michigan. The OFIS lacks the authority to implement such rules because they are inconsistent with the express statutory ratemaking provisions duly enacted through the legislative process.

Recognizing its inability to reduce otherwise valid rates through the implementation of rules, the OFIS disingenuously argues that the rules do not invalidate existing approved rate filings. However, the OFIS cannot deny that the purpose, intent, or desired effect of the OFIS rules is to abolish the use of insurance scores (consideration of the insured's credit report) in the

ratemaking process. However, pursuant to the ratemaking process provided under the Insurance Code, many rates on file with the OFIS permit an insurer to consider an insured's credit history to establish the insured's policy rate. In no uncertain terms, the OFIS rules, if deemed valid, would render invalid existing rate filings for all insurers who use insurance scoring to determine their rates.

The OFIS also argues that every aggrieved insurer can ignore the rules and thereby force the OFIS to conduct a contested case hearing. Thus, the OFIS concludes, it has not circumvented the process for establishing rates provided in the Insurance Code. There is no merit to this claim. Any hearing conducted by the OFIS would presume that the rules challenged by plaintiffs in this case are valid and enforceable. The sum and substance of the hearing would be a review of whether the insurer utilized insurance scoring as that term is defined in R 500.2151(1). If the answer is in the affirmative, the insurer loses and is subject to the penalties for violating the rules. To the extent the OFIS believes that insurance scoring is not a permissible ratemaking factor, the OFIS is obligated to initiate a contested case against an individual insurer, thereby allowing the insurer to establish whether its rates are excessive, inadequate, or unfairly discriminatory under the Insurance Code.

2. THE OFIS CANNOT ORDER THROUGH ITS RULEMAKING AUTHORITY RATE REDUCTIONS WITHOUT FIRST FINDING THROUGH AN ADMINISTRATIVE HEARING THAT THE INSURER'S RATES ARE EXCESSIVE

As previously stated, the effect of the rules implemented by the OFIS is to order a rate reduction for certain policyholders with low insurance scores. The OFIS has no authority to order rate reductions without

first determining that an insurer's rates are excessive. The term "excessive" is defined in the Insurance Code, which provides that a "rate shall not be held to be excessive unless the rate is unreasonably high for the insurance coverage provided *and* a reasonable degree of competition does not exist for the insurance to which the rate is applicable." MCL 500.2109(1)(a) (emphasis added); see also MCL 500.2403(1)(d) and 500.2603(1)(d). Administrative hearings are required, again individual hearings for individual insurers, to determine whether a rate is excessive and whether there is a lack of competition. MCL 500.2114, 500.2115, 500.2418, and 500.2618.

Here, no individual administrative hearings were held to address either the excessiveness of an individual insurer's rates or the competition within the marketplace. Thus, the rules implemented by the OFIS are inconsistent with the scheme put in place by the Legislature.

For these reasons, I would affirm the opinion and order of the lower court.

KELLY, J. (*concurring in part and dissenting in part.*) I concur with Judge WHITE's conclusion that the trial court erred in failing to limit its review to the administrative record, *Michigan Ass'n of Home Builders v Dep't of Labor & Economic Growth Director*, 481 Mich 496; 750 NW2d 593 (2008), and that the trial court's opinion and order granting a permanent injunction must be vacated for that reason alone. However, I respectfully dissent from the conclusion of Judge WHITE and Judge ZAHRA that this matter was properly before the trial court. The circuit court erred by permitting plaintiffs to proceed by way of an original action. Finding this issue dispositive, I would not reach the remaining issues.

Issues of statutory interpretation present questions of law that are reviewed de novo. *Michigan Basic Prop Ins Ass'n v Ware,* 230 Mich App 44, 48; 583 NW2d 240 (1998). "The primary purpose of statutory interpretation is to ascertain and give effect to the intent of the Legislature." *Id.* at 49. Where the statutory language is clear and unambiguous, a court must apply it as written. *Howard v Clinton Charter Twp,* 230 Mich App 692, 695; 584 NW2d 644 (1998). In addition to these basic principles, we keep in mind that the wisdom of a statute is for the Legislature to determine and the law must be enforced as written. *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich 420, 430; 617 NW2d 536 (2000); *In re Worker's Compensation Lien*, 231 Mich App 556, 562-563; 591 NW2d 221 (1998). This Court "may not inquire into the knowledge, motives, or methods of the Legislature, and may not impose a construction on a statute based on a policy decision different from that chosen by the Legislature." *Fowler v Doan*, 261 Mich App 595, 599; 683 NW2d 682 (2004) (citations omitted).

Section 244(1) of the Insurance Code, MCL 500.244(1), provides:

> A person aggrieved by a final order, decision, finding, ruling, opinion, *rule*, action, or inaction provided for under this act may seek judicial review in the manner provided for in chapter 6 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.301 to 24.306. [Emphasis added.]

"MCL 24.264 [§ 64 of chapter 3 of the Administrative Procedures Act] allows a plaintiff to challenge the validity of a rule in an action for a declaratory judgment." *Michigan Ass'n of Home Builders, supra* at 499. MCL 24.264 provides:

> *Unless an exclusive procedure or remedy is provided by a statute governing the agency,* the validity or applicability of

> a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his principal place of business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. *An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously.* This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted. [Emphasis added.]

In *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483; 586 NW2d 563 (1998), two insurance companies challenged an administrative decision of the insurance commissioner by filing both a petition for review under § 244 of the Insurance Code, MCL 500.244, and a complaint in the circuit court. The circuit court dismissed the original action, concluding that the insurance companies were limited to a petition for review. This Court affirmed, holding that § 244(1) establishes *the exclusive procedure* for challenging the commissioner's decisions:

> We also reject appellants' argument that the trial court improperly dismissed their attempt to start an original action.
>
> The commissioner's decisions may be challenged only as provided in the Insurance Code, i.e., "in the manner provided for in chapter 6 of the administrative procedures act . . . ." MCL 500.244(1); MSA 24.1244(1). Under the APA, administrative decisions are "subject to *direct review* by the courts as provided by law." MCL 24.301; MSA 3.560(201) (emphasis added). *Review is to be sought by filing a petition for review*, MCL 24.302; MSA 3.560(202),

> in the circuit court, MCL 24.303(1); MSA 3.560(203)(1), within sixty days of the date when the agency's decision was mailed, MCL 24.304(1); MSA 3.560(204)(1). *Clearly, an independent action attacking the agency's decision is not contemplated*. [*Northwestern Nat'l Cas*, *supra* at 495-496 (emphasis added in part).]

Plaintiffs argue that *Northwestern Nat'l Cas*, is distinguishable because it involved an "adjudicatory" action, whereas this case involves a "legislative" action. This argument fails for two reasons. First, the *Northwestern Nat'l Cas* Court made no such distinction. And second, § 244(1), applied by the *Northwestern Nat'l Cas* Court, expressly applies to a "rule" of an agency, i.e., to "legislative" actions, because it provides: "A person aggrieved by a final order, decision, finding, ruling, opinion, *rule*, action, or inaction provided for under this act may seek judicial review in the manner provided for in chapter 6 of the administrative procedures act . . . ." MCL 500.244(1) (emphasis added).

The circuit court's determination that § 244(1) does not provide an exclusive remedy because it uses permissive, not mandatory, language (an aggrieved party "*may* seek judicial review") was unsupported by authority and is contrary to *Northwestern Nat'l Cas*. Plaintiffs cite no authority in support of such a reading of § 244(1). The circuit court erroneously allowed plaintiffs' original action to proceed.

Thus, I would vacate the circuit court's opinion and order granting a permanent injunction and declaring defendant's rules illegal, unenforceable, and void, and dismiss plaintiffs' case without prejudice to plaintiffs' filing a petition for review under MCL 500.244.

WHITE v HARRISON-WHITE

Docket No. 272612. Submitted March 4, 2008, at Grand Rapids. Decided August 21, 2008, at 9:10 a.m.

Kevin R. White obtained a divorce from Diane M. Harrison-White in the Kent Circuit Court, which awarded the parties joint legal custody of their son, Callum White, primary physical custody to the defendant, and liberal parenting time to the plaintiff. The plaintiff's parenting time was to be spent in Michigan and in Ontario, Canada, where the parties were originally from and where the defendant and the parties' son relocated before the plaintiff filed for divorce. The defendant subsequently filed a motion in the circuit court for a finding that the court lacked exclusive, continuing jurisdiction under MCL 722.1201(1)(a), a provision of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) that states, in part, that a Michigan court that has made an initial child-custody determination has exclusive, continuing jurisdiction over the child-custody determination until a Michigan court determinates that neither the child nor the child and one parent have a significant connection with Michigan and that substantial evidence is no longer available in Michigan concerning the child's care, protection, training, and personal relationships. The court, Kathleen A. Feeney, J., granted the motion. The plaintiff appealed by leave granted.

The Court of Appeals *held*:

The significant connection that permits the exercise of exclusive, continuing jurisdiction under MCL 722.1202(1)(a) exists where one parent resides in Michigan, maintains a meaningful relationship with the child, and, in maintaining the relationship, exercises parenting time in Michigan. Such significant connection is present in this case.

Reversed and remanded.

PARENT AND CHILD — UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT — INITIAL CUSTODY DETERMINATION — EXCLUSIVE, CONTINUING JURISDICTION.

A Michigan court that made the initial child-custody determination in a divorce proceeding has exclusive, continuing jurisdiction over

> the child-custody determination where the child and one parent have a significant connection with Michigan; such connection exists where one parent resides in Michigan, maintains a meaningful relationship with the child, and, in maintaining the relationship, exercises parenting time in Michigan (MCL 722.1202[1][a]).

Strain, Murphy & Vanderwal, P.C. (by *Peter D. Bosch*), for the plaintiff.

Margaret E. Allen for the defendant.

Before: FITZGERALD, P.J., and SMOLENSKI and BECKERING, JJ.

PER CURIAM. Plaintiff appeals by leave granted the May 19, 2006, trial court order granting defendant's motion for a finding that the court lacked exclusive, continuing jurisdiction under the relevant provision of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1202(1)(a). We reverse and remand for proceedings consistent with this opinion.

I

The parties were married in Ontario, Canada, in September 1993, and their son, Callum White, was born in Ontario in July 1997. In May 2000, plaintiff began employment in Grand Rapids, Michigan. He then commuted between Ontario and Michigan for almost one year. In February 2001, plaintiff, defendant, and Callum moved to Rockford, Michigan. But, by February 2004, the parties' marriage had broken down and defendant and Callum returned to Ontario, where they currently reside.

Plaintiff filed for a divorce in March 2004. The trial court issued a temporary order dated July 6, 2004,

stating that plaintiff "shall exercise parenting time with the parties' minor child every other weekend . . . with every other visitation occurring in Ontario, Canada and every other visitation occurring in Rockford, Michigan," as well as alternating holiday and vacation parenting time. The court entered a judgment of divorce in July 2005, awarding joint legal custody to the parties, but primary physical custody to defendant. The divorce judgment awarded plaintiff liberal parenting time to be exercised in Michigan and Ontario.

The parenting time provisions of the divorce judgment were twice amended, and the August 29, 2005, amendment to the judgment provides, in part:

> The Plaintiff shall have reasonable and liberal parenting time with the parties' minor child, including but not limited to alternating weekends and every other holiday. The weekend and holiday visitation shall be as follows:
>
> A. Every other weekend as set forth in the Court's Order dated July 6, 2004.
>
> B. From December of 2005 through March of 2006, the Plaintiff shall exercise parenting time as set forth in the Court's Temporary Order dated July 6, 2004. In that regard, the Plaintiff shall exercise his parenting time with the child in Ontario, Canada with alternating weekends of the parenting time being exercised in the United States.
>
> C. Beginning in April of 2006 and continuing through November of 2006 and for similar periods in calendar years thereafter, the Plaintiff shall have the right to exercise his parenting time in the United States for two alternate weekends in a row, with parenting time for the third alternate weekend being exercised in Canada.
>
> D. Beginning in April of 2007 and continuing through November of 2007 and for similar periods in calendar years thereafter, the Plaintiff may exercise his parenting time in the United States for three consecutive alternating weekends, with the fourth being exercised in Ontario, Canada.

The amendment further provides that plaintiff shall be entitled to regular telephone contact with Callum, alternating holiday parenting time, and vacation parenting time, including, but not limited to, every other spring vacation, half of Christmas vacation and, beginning in 2008, three consecutive weeks of summer vacation. In an order dated March 20, 2006, the trial court granted plaintiff's request for make-up visitation, as well as parenting time on Christmas Day 2006 and 2007.

On March 30, 2006, defendant moved for a finding that the trial court no longer had exclusive, continuing jurisdiction over custody determinations in this case, pursuant to MCL 722.1202(1)(a) and (b). The trial court granted defendant's motion in a May 19, 2006, order, determining that it no longer had jurisdiction under "MCL 722.1202(1)(a) and 722.1203" because "neither the child nor his parents [sic] have a significant connection with the State of Michigan and substantial evidence is no longer available in the state concerning the child's care, protection, training and personal relationships . . . ." The court noted at the hearing on the matter, however, that it was reluctant to grant the motion because it seemed illogical to divest the court of jurisdiction considering that defendant had submitted to the jurisdiction of the Michigan courts at the time of the divorce judgment and subsequent custody rulings, despite the fact that she and Callum were already living in Ontario. We subsequently granted plaintiff's delayed application for leave to appeal. *White v Harrison-White*, unpublished order of the Court of Appeals, entered November 27, 2006 (Docket No. 272612).

II

In this case of first impression, we are asked to construe the meaning of MCL 722.1202(1)(a), particu-

larly the phrase "significant connection," to determine whether exclusive, continuing jurisdiction remained in Michigan under the circumstances presented. The determination whether a trial court has subject-matter jurisdiction and issues of statutory construction present questions of law, which we review de novo. *Atchison v Atchison*, 256 Mich App 531, 534-535; 664 NW2d 249 (2003).

As this Court stated in *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389-390; 559 NW2d 98 (1996):

> The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. Statutory language should be construed reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. [Citations omitted.]

Every word or phrase of a statute should be accorded its plain and ordinary meaning, but if the legislative intent cannot be determined from the statute itself, this Court may consult dictionary definitions. *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007). Additionally, decisions from other states may guide this Court when interpreting uniform acts. *SCD Chem Distributors, Inc v Medley*, 203 Mich App 374, 378; 512 NW2d 86 (1994).

III

The UCCJEA was promulgated by the National Conference of Commissioners on Uniform State Laws in 1997 and became effective in Michigan in 2002. *Atchi-*

son, *supra* at 536. The UCCJEA was designed to replace the Uniform Child Custody Jurisdiction Act (UCCJA) and "rectify thirty years of inconsistent case law and revise child-custody jurisdiction in light of overlapping federal enactments." *Id*. The UCCJEA was further designed to

> (1) rectify jurisdictional issues by prioritizing home-state jurisdiction, (2) clarify emergency jurisdictional issues to address time limitations and domestic-violence issues, (3) clarify the exclusive continuing jurisdiction for the state that entered the child-custody decree, (4) specify the type of custody proceedings that are governed by the act, (5) eliminate the term "best interests" to the extent that it invited a substantive analysis into jurisdictional considerations, and (6) provide a cost-effective and swift remedy in custody determinations. [*Id.*]

When applying the general and jurisdictional provisions of the UCCJEA, a foreign country is treated as a state of the United States. *Id*. at 537.

MCL 722.1202, which provides for the retention of exclusive, continuing jurisdiction for the state that entered the custody decree, was specifically designed to "rectify conflicting proceedings and orders in child-custody disputes." *Id*. at 538. MCL 722.1202 states, in relevant part:

> (1) Except as otherwise provided in section 204[1], a court of this state that has made a child-custody determination consistent with section 201[2] or 203[3] has exclusive, continuing jurisdiction over the child-custody determination until either of the following occurs:

---

[1] MCL 722.1204 provides temporary emergency jurisdiction if the child has been abandoned or is threatened with mistreatment or abuse.

[2] MCL 722.1201 provides jurisdiction for an initial custody determination.

[3] MCL 722.1203 governs the modification of custody determinations made by other states.

> (a) A court of this state determines that neither the child, nor the child and 1 parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.
>
> (b) A court of this state or a court of another state determines that neither the child, nor a parent of the child, nor a person acting as the child's parent presently resides in this state.
>
> (2) A court of this state that has exclusive, continuing jurisdiction under this section may decline to exercise its jurisdiction if the court determines that it is an inconvenient forum under section 207.[4]

Under MCL 722.1202(1)(a), a court of this state that makes an initial custody determination retains exclusive, continuing jurisdiction until neither the child nor the child and one parent or a person acting as a parent "have a significant connection with this state" *and* "substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships." The Legislature's use of the term "and" compels the conclusion that jurisdiction is retained until both the requisite significant connection and the requisite substantial evidence are lacking. See *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 43; 732 NW2d 56 (2007). The literal meanings of the terms "and" and "or" should be followed if they do not render the statute dubious. *Auto-Owners Ins v Stenberg Bros*, 227 Mich App 45, 50-51; 575 NW2d 79 (1997); *Root v Ins Co of North America*, 214 Mich App 106, 109; 542 NW2d 318 (1995). Here, a literal reading of the term "and" does not render the statute dubious; instead, it provides a clear, two-pronged test for exclusive, con-

[4] MCL 722.1207 provides that a court may decline jurisdiction if it is an inconvenient forum.

tinuing jurisdiction. Therefore, we conclude that a literal reading was intended. Further, we note that our literal interpretation of the statute's plain, unambiguous language comports with that of a majority of jurisdictions. See, e.g., *West v West*, 364 Ark 73, 84; 216 SW3d 557 (2005); *In re Forlenza*, 140 SW3d 373, 379 (Tex, 2004); *Benson v Benson*, 667 NW2d 582, 585 (ND, 2003); *Griffith v Tressel*, 394 NJ Super 128, 141; 925 A2d 702 (2007); *Grahm v Superior Court*, 132 Cal App 4th 1193, 1196; 34 Cal Rptr 3d 270 (2005); *Fish v Fish*, 266 Ga App 224, 226-227; 596 SE2d 654 (2004); *Ruth v Ruth*, 32 Kan App 2d 416, 421; 83 P3d 1248 (2004); but see, e.g., *In re Marriage of Medill*, 179 Or App 630, 641-642; 40 P3d 1087 (2002).

In this case, the trial court determined that it no longer had exclusive, continuing jurisdiction under MCL 722.1202(1)(a), given a lack of significant connection and substantial evidence. We find, however, that the requisite significant connection exists in this case.

The phrase "significant connection" is not defined in the UCCJEA. *Random House Webster's College Dictionary* (2005) generally defines the term "significant" as "important; of consequence," or "having or expressing a meaning," and the term "connection" as "the state of being connected," or an "association; relationship." Therefore, pursuant to the plain and ordinary meaning of the phrase "significant connection," exclusive, continuing jurisdiction is retained under MCL 722.1202(1)(a) as long as the child and at least one parent have an important or meaningful relationship to the state. See *Haynes*, *supra* at 36.

Next, we consider how other jurisdictions have interpreted the phrase "significant connection" in provisions similar to MCL 722.1202(1)(a). See *SCD Chem Distributors, Inc*, *supra* at 378. Defendant urges this Court

to adopt Oregon's narrow interpretation of "significant connection." In *Medill*, *supra*, the Oregon Court of Appeals found a lack of significant connection where the children were born in Germany, lived in Germany for the majority of their lives, and made only one visit to Oregon after their father moved there. *Id*. at 632-633, 641. The court found that the children's short-term visit to Oregon, coupled with the father's and his family's presence in the state, were not the sort of "maximum rather than minimum contact[s]" required to retain exclusive, continuing jurisdiction under the UCCJEA. *Id*. at 641 (internal quotation marks omitted). In so finding, the *Medill* court relied on prior Oregon cases interpreting the phrase "significant connection" in the UCCJA. *Id*., citing *Stubbs v Weathersby*, 320 Or 620, 627-628 n 4; 892 P2d 991 (1995) (stating that to establish a significant connection, there must be maximum rather than minimum contact with the state), and *State ex rel Efaw v Bue*, 117 Or App 477, 480-481; 844 P2d 278 (1992).

On the other hand, plaintiff urges us to adopt a broad interpretation of "significant connection." In *Grahm*, *supra*, the California Court of Appeals held that "the original state retains continuing exclusive jurisdiction [under the UCCJEA] as long as the parent who is exercising visitation rights still lives in that state and the relationship between that parent and the child has not deteriorated to the point at which the exercise of jurisdiction would be unreasonable." *Id*. at 1200. Like the *Medill* court, the *Grahm* court based its holding on a prior California case interpreting the phrase "significant connection" in the UCCJA. *Id*., citing *Kumar v Superior Court*, 32 Cal 3d 689; 186 Cal Rptr 772; 652 P2d 1003 (1982). Additionally, the *Grahm* court reasoned that its interpretation of "significant connection" comports with the intended application of the UCCJEA,

that " '[s]o long as one parent, or person acting as a parent, remains in the state that made the original custody determination, only that state can determine *when the relationship between the child and the left-behind parent has deteriorated sufficiently so that jurisdiction is lost*.' " *Grahm*, *supra* at 1198, quoting Spector, *Uniform child-custody jurisdiction and enforcement act (with prefatory note and comments)*, 32 Fam L Q 301, 340 n 81 (1998) (italics added in *Grahm*); see also UCCJEA, § 202 comment 1 ("If the relationship between the child and the person remaining in the State with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist."). The court further found that even if it adopted the *Medill* court's narrow interpretation of "significant connection," a significant connection existed in *Grahm*. *Grahm*, *supra* at 1199. The parties' children were born in California and resided there for half of their life, and their father was granted specific periods of custody in California. *Id*.

After a comprehensive review of the cases addressing this issue, it is apparent that a majority of jurisdictions have found a significant connection under provisions similar to MCL 722.1202(1)(a) where one parent resides in the state and exercises at least some parenting time in the state. The Kansas Court of Appeals has held, in accordance with UCCJEA, § 202 comment 1, that "[t]he state where the original decree was entered retains exclusive, continuing jurisdiction over child custody determinations provided the general requirement of the substantial connection jurisdictional provisions are met, even if a child has acquired a new home state. However, exclusive, continuing jurisdiction will no longer exist if the relationship between the child and the person remaining in the state with exclusive, con-

tinuing jurisdiction becomes so attenuated that a court could no longer find significant connections and substantial evidence." *Ruth*, *supra* at 421, citing *Benson*, *supra* at 585. Applying this standard, the court found that a significant connection existed where the father resided in Kansas, and the children visited Kansas two weekends each month and eight weeks during the summer. *Ruth*, *supra* at 421-422. The Kentucky Court of Appeals has adopted the exclusive, continuing jurisdiction standard articulated by the Kansas and North Dakota courts, and found that a significant connection existed where the children's father and their sibling resided in Kentucky and visitation took place in Kentucky. *Wallace v Wallace*, 224 SW3d 587, 590 (Ky App, 2007).

Similarly, in *Fish*, *supra* at 226, the Georgia Court of Appeals found a significant connection where the father lived in Georgia, visitation occurred in Georgia, the children spent Spring Break and the month of July in Georgia, and the parties agreed to jurisdiction in Georgia. The court pointed out that because the mother had agreed that Georgia courts had jurisdiction to modify the original custody decree, she could not "evade that jurisdiction based on her residency in a different state, as that is the exact result that the UCCJEA was designed to prevent." *Id.* In *West*, *supra* at 84, the Arkansas Supreme Court found a significant connection where the father and his relatives lived in Arkansas and the children spent at least 20 percent of their time with him in Arkansas. A New York court found a significant connection where the mother and child resided in Norway, but the father resided in New York. *EB v EFB*, 7 Misc 3d 423, 431; 793 NYS2d 863 (2005). The child returned to New York for several weeks at a time to visit his father pursuant to a written agreement. *Id*. A number of other states have applied provisions

similar to MCL 722.1202(1)(a) in the same manner. See, e.g., *Griffith*, *supra* at 145-148 (finding a significant connection where the father resided in New Jersey and the child spent at least 20 percent of each year in New Jersey), citing *Forlenza*, *supra*, *Horgan v Romans*, 366 Ill App 3d 180; 851 NE2d 209 (2006), and *Steckler v Steckler*, 921 So 2d 740 (Fla App, 2006).

Considering the foregoing, we conclude that the significant connection that permits exercise of exclusive, continuing jurisdiction under MCL 722.1202(1)(a) exists where one parent resides in the state, maintains a meaningful relationship with the child, and, in maintaining the relationship, exercises parenting time in the state. Our interpretation of the phrase "significant connection" comports with that of a majority of jurisdictions, the plain and ordinary meaning of the phrase, and the overarching purpose of the UCCJEA to prevent jurisdictional disputes by granting exclusive, continuing jurisdiction to the state that entered the initial custody decree, so long as the relationship between the child and the parent residing in the state does not become so attenuated that the requisite significant connection no longer exists. See *Atchison*, *supra* at 536, 538, and UCCJEA, § 202 comment 1. Our interpretation of "significant connection" is neither so narrow that it requires "maximum rather than minimum contact" with the state, see *Medill*, *supra*, nor is it so broad that it primarily focuses on the residency of the noncustodial parent, see *Grahm*, *supra*.

In reaching this conclusion, we acknowledge defendant's argument that a broad interpretation of "significant connection" could produce "nonsensical results," meaning that a court of this state could retain jurisdiction where substantial evidence concerning the child's

care, protection, training, and personal relationships is no longer available in the state, but "the child continues to visit the remaining parent in the state, however rarely." We note, however, that MCL 722.1202 safeguards against nonsensical results. Even if a court of this state determines that it has exclusive, continuing jurisdiction under MCL 722.1202(1)(a) on the basis of either significant connection or substantial evidence, the court may decline to exercise its jurisdiction if it determines that it is an inconvenient forum under MCL 722.1207. MCL 722.1202(2). The trial court did not assess whether Michigan is an inconvenient forum and defendant has not raised the issue on appeal.

As stated earlier, we find that the significant connection that permits exercise of exclusive, continuing jurisdiction is present in this case. The parties and their son, Callum, are originally from Ontario, but they lived together in Michigan for three years. When the parties separated in 2004, plaintiff remained in Michigan and defendant returned to Ontario with Callum. Defendant submitted to the jurisdiction of the Michigan courts at the time of the divorce judgment and subsequent custody rulings. Since the parties' separation, plaintiff has maintained a meaningful relationship with Callum and regularly exercises parenting time in Michigan. Pursuant to the custody agreement, plaintiff has regular telephone contact with Callum, parenting time on alternating weekends (at least half of which is exercised in Michigan), alternating holiday parenting time, and vacation parenting time, including, but not limited to, every other spring vacation, half of Christmas vacation and, beginning in 2008, three consecutive weeks of summer vacation in Michigan.

Because we conclude that plaintiff and his minor child have a significant connection with this state, it is

unnecessary to consider whether there is substantial evidence available in this state concerning the child's care, protection, training, and personal relationships. One of the two alternative bases for retaining exclusive, continuing jurisdiction under MCL 722.1202(1)(a) is satisfied. Therefore, we reverse the trial court's finding that it lacked jurisdiction over custody determinations in this case and remand the case for entry of an order consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

ROBERTS v SAFFELL

Docket No. 275458. Submitted June 11, 2008, at Detroit. Decided August 21, 2008, at 9:15 a.m. Leave to appeal sought.

Richard R. and Stacey D. Roberts brought an action in the Leelanau Circuit Court against Robert L. and Joanne O. Saffell, seeking damages arising from the defendants' alleged failure to disclose a termite infestation in a residence that the plaintiffs purchased from the defendants. The plaintiffs alleged breach of contract, fraudulent misrepresentation, silent fraud, and innocent misrepresentation. All the claims were based on the defendants' response of "no" in a seller's disclosure statement (SDS) to the inquiry concerning any history of infestation. The SDS was provided by the defendants in compliance with the requirements of the Seller Disclosure Act, MCL 565.951 *et seq*. Before trial, the plaintiffs moved to dismiss all theories of liability except innocent misrepresentation. The court, Philip E. Rodgers, Jr., J., granted the motion. The defendants argued that actions for innocent misrepresentation may not be brought under the act and moved for summary disposition. The court denied the motion. Following a jury trial where the jury awarded the plaintiffs damages and costs, the court entered a judgment and order in favor of the plaintiffs. The defendants appealed.

The Court of Appeals *held*:

1. A claim of innocent misrepresentation is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation. The essence of an innocent misrepresentation claim is that the plaintiff need not prove that the defendant knew or should have known that the representation was false or that the defendant intended to deceive the plaintiff into relying on the false or misleading statement. False statements that the plaintiff relied on are actionable under the theory of innocent misrepresentation irrespective of whether the defendant acted in good faith in making them.

2. The act requires a transferor to complete the SDS by answering the questions in good faith and with honesty on the basis of the information actually known to the transferor at the

time the SDS is completed. The act does not require a transferor to exercise ordinary care to discover defects in the property being transferred. A transferor may not be held liable for any errors, inaccuracies, or omissions in an SDS unless they were within the transferor's personal knowledge.

3. A transferor cannot be found liable for an innocent misrepresentation regarding a disclosure required under the act because an innocent-misrepresentation claim would allow liability for erroneous information even if the transferor lacked personal knowledge that the information was false and acted in good faith. The act precludes the imposition of liability on transferors who lack personal knowledge with respect to errors, inaccuracies, or omissions in an SDS. The trial court, in permitting the plaintiffs' innocent-misrepresentation claim, failed to recognize the statutory exemption from liability when transferors lack personal knowledge of errors in an SDS. The trial court erred in denying the defendants' motion for summary disposition. The judgment and order of the trial court must be reversed and the matter must be remanded for entry of a judgment in favor of the defendants.

Reversed and remanded.

WHITE, J., dissenting, stated that the jury was presented with a case concerning whether the defendants knew of the termite infestation and intentionally withheld the information from the plaintiffs. Notwithstanding the terms used at trial, this is not a case concerning innocent misrepresentation. The issues of the defendants' knowledge and their credibility, as well as their good faith, were properly submitted to the jury. There was ample evidence to support the jury's conclusion that the defendants had knowledge of the infestation and did not act in good faith under the act in not disclosing that knowledge. The judgment and order of the trial court should be affirmed.

1. VENDOR AND PURCHASER — RESIDENTIAL PROPERTY — SELLER DISCLOSURE ACT.

The Seller Disclosure Act does not require a transferor to exercise ordinary care to discover defects in the property being transferred (MCL 565.951 *et seq*.).

2. VENDOR AND PURCHASER — SELLER DISCLOSURE ACT — SELLER'S DISCLOSURE STATEMENTS — INNOCENT MISREPRESENTATION.

A transferor of property may not be held liable under a theory of innocent misrepresentation with respect to errors, inaccuracies, or omissions in a seller's disclosure statement provided in accordance

with the Seller Disclosure Act; innocent misrepresentation is not a viable theory of liability under the Seller Disclosure Act (MCL 565.951 *et seq*.).

Mark Granzotto, P.C. (by *Mark Granzotto*), for the plaintiffs.

Traverse Legal, P.L.C. (by *C. Enrico Schaefer*) (*Bendure & Thomas*, by *Mark R. Bendure*, of counsel), for the defendants.

Before: MARKEY, P.J., and WHITE and WILDER, JJ.

MARKEY, P.J. Defendants appeal by right a judgment entered after a jury trial awarding plaintiffs $86,813 in damages and costs. Plaintiffs claim that defendants failed to disclose a termite infestation in the residence plaintiffs purchased from defendants. Before trial, the trial court granted plaintiffs' motion to dismiss all theories of liability except innocent misrepresentation. This claim was based on defendants "no" answer on their seller's disclosure statement (SDS), MCL 565.957, in response to SDS item: "History of infestation, if any: (termites, carpenter ants, etc.)." We agree with defendants' argument that innocent misrepresentation is not a viable theory of liability under the Seller Disclosure Act (SDA), MCL 565.951 *et seq*. Consequently, we reverse and remand for entry of judgment for defendants.

Plaintiffs' complaint originally alleged breach of contract and three fraud claims: fraudulent misrepresentation or common-law fraud, silent fraud, and innocent misrepresentation. All plaintiffs' claims were based on defendants' response to the query regarding infestation on the SDS. After discovery, defendants moved for summary disposition under MCR 2.116(C)(8) and (10), arguing, among other things, that a claim for innocent

misrepresentation cannot exist under the SDA. The trial court denied this motion.

Less than one week before trial, plaintiffs moved to voluntarily dismiss all claims except innocent misrepresentation and to amend their complaint to allege that defendants misrepresented whether structural modifications had been made without necessary permits. At the hearing on plaintiffs' motions and other pretrial matters, defendants again asserted their position that innocent misrepresentation was not a cognizable theory of liability under the SDA. The trial court denied plaintiffs' motion to amend the complaint, ruling that the evidence concerning permits would be admitted on credibility issues. The court, however, granted plaintiffs' motion to dismiss all claims except innocent misrepresentation. With respect to defendants' argument that a claim for innocent misrepresentation was not viable under the SDA, the court reserved its ruling on the issue until the close of plaintiffs' proofs and until after defendants had moved for a directed verdict.

In essence, defendants argued below that liability for an error, inaccuracy, or omission in the SDS exists only if defendants had actual knowledge of the error, inaccuracy, or omission. MCL 565.955(1). Defendants relied on several unpublished opinions of this Court, including *Pena v Ellis*, unpublished opinion per curiam of the Court of Appeals, issued April 18, 2006 (Docket No. 257840); *Huhtasaari v Stockemer*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2005 (Docket No. 256926); *Timmons v DeVoll*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2004 (Docket No. 241507); and *Paule v Iwaniw*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2001 (Docket No. 225590). The trial court rejected defendants' argument

on the basis of this Court's decision in *Bergen v Baker*, 264 Mich App 376; 691 NW2d 770 (2004), which held that in adopting the SDA, "the Legislature intended to allow for seller liability in a civil action alleging fraud or violation of the act brought by a purchaser on the basis of misrepresentations or omissions in a disclosure statement, but with some limitations." *Id*. at 385. The trial court reasoned that *Bergen* prevails over this Court's unpublished opinions and held that actions for innocent misrepresentation may be brought for alleged errors, inaccuracies, or omissions in an SDS, subject to certain limitations. In this regard, *Bergen* held liability is precluded "for errors, inaccuracies, or omissions in a seller disclosure statement that existed when the statement was delivered where the seller lacked personal knowledge, and would not have had personal knowledge by the exercise of ordinary care . . . ." *Id*.

We review de novo a trial court's decision to grant or deny summary disposition. *Id*. at 381. A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). The motion should be granted if the pleadings fail to state a claim upon which relief can be granted and no factual development could possibly justify recovery. *Id*.

Similarly, the Court reviews de novo the trial court's decision on a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006).

This case also involves statutory construction, a question of law we review de novo. *Niles Twp v Berrien Co Bd of Comm'rs,* 261 Mich App 308, 312; 683 NW2d 148 (2004). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Id*. at 313. Our Supreme Court provided guiding principles for performing this task in *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002):

> An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. To do so, we begin with an examination of the language of the statute. If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. [Citations omitted.]

The common-law rule with respect to real estate transactions is *caveat emptor*.[1] *Christy v Prestige Builders, Inc*, 415 Mich 684, 695 n 7; 329 NW2d 748 (1982). Thus, at common law "a land vendor who surrenders title, possession, and control of property shifts all responsibility for the land's condition to the purchaser." *Id*. at 694. In *Christy*, the Court recognized two exceptions to the general rule of *caveat emptor* regarding negligence actions arising from real estate sales. *Id*. First, the seller has a duty to disclose to the buyer any concealed condition known to the seller that involves an unreasonable danger. Second, after the sale, the seller is liable to those outside the land for a dangerous condition on the land until the buyer discovers or should

[1] Latin for "let the buyer beware." Black's Law Dictionary (7th ed). "A doctrine holding that purchasers buy at their own risk." *Id*.

have discovered it. *Id*.; see also *M & D, Inc v McConkey*, 231 Mich App 22, 34; 585 NW2d 33 (1998). Outside the context of a negligence action for personal injury, Michigan recognizes several theories of fraud as exceptions to the common-law rule of *caveat emptor* in real estate transactions: (1) traditional common-law fraud, (2) innocent misrepresentation, and (3) silent fraud. *Id.* at 26-27. In this case, in addition to a claim of breach of contract, plaintiffs originally asserted all three theories of fraud.

To prove a claim of fraudulent misrepresentation, or common-law fraud, a plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. See *id.* at 27; see also *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 499-500; 686 NW2d 770 (2004), quoting *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000).

Silent fraud or fraudulent concealment has also long been recognized in Michigan. See *Lorenzo v Noel*, 206 Mich App 682, 684; 522 NW2d 724 (1994). " ' "A fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud." ' " *Id*., quoting *Williams v Benson*, 3 Mich App 9, 18-19; 141 NW2d 650 (1966), quoting *Tompkins v Hollister*, 60 Mich 470, 483; 27 NW 651

(1886). But for the suppression of information to constitute silent fraud there must exist a legal or equitable duty of disclosure. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 125; 313 NW2d 77 (1981). Further, establishing silent fraud requires more than proving that the seller was aware of and failed to disclose a hidden defect. *McConkey*, *supra* at 30-32. Instead, to prove a claim of silent fraud, a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive. *Id*. at 31-32, 36.

As noted already, plaintiffs chose to voluntarily dismiss their claims of fraudulent misrepresentation, silent fraud, and breach of contract. Plaintiffs chose to rely solely on their claim of innocent misrepresentation, a doctrine that also has long been recognized in Michigan. *United States Fidelity & Guaranty Co, supra* at 115. "A claim of innocent misrepresentation is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation." *Forge v Smith*, 458 Mich 198, 211-212; 580 NW2d 876 (1998). It is unnecessary to prove that the party making the representation had knowledge that it was false. *Id*.; *United States Fidelity & Guaranty Co, supra* at 115. But for liability under a theory of innocent misrepresentation to arise there must be privity of contract between the party making the representation and the party claiming to have detrimentally relied on it. *Forge*, *supra* at 212; *McConkey*, *supra* at 28.

Innocent misrepresentation is quite different from fraudulent misrepresentation and silent fraud. In a common-law fraud action, the plaintiff must establish that the defendant knowingly or recklessly misrepresented a material fact with the intent that the other

party rely on it. *McConkey*, *supra* at 27; see also M Civ JI 128.01. Likewise, for silent fraud, the plaintiff must prove that the defendant knew of a material fact but concealed or suppressed the truth through false or misleading statements or actions and with the intent to deceive. *McConkey*, *supra* at 28-33; see also M Civ JI 128.02.

In contrast to fraudulent misrepresentation and silent fraud, the essence of an innocent misrepresentation claim is that the plaintiff need *not* prove that the defendant knew or should have known that the representation was false. *United States Fidelity & Guaranty Co*, *supra* at 116-117. Likewise, contrary to fraudulent misrepresentation and silent fraud, a plaintiff asserting an innocent misrepresentation claim need not prove that the defendant intended to deceive the plaintiff into relying on the false or misleading representation. *Id*. at 117-118; *McConkey*, *supra* at 27-28. Indeed, under the theory of innocent misrepresentation, false statements the claimant relied on are actionable " 'irrespective of whether the person making them acted in good faith in making them . . . .' " *United States Fidelity & Guaranty Co*, *supra* at 116, quoting 37 Am Jur 2d, Fraud and Deceit, § 195, p 257.

It is against this background of the common law that we examine whether a claim of innocent misrepresentation is viable within the context of a response on a seller's disclosure statement required by the SDA. Contrary to the trial court's conclusion, this Court did not decide this issue in *Bergen*, *supra*. In that case, the plaintiffs had purchased a home from the defendants and subsequently discovered a significant leak in the home's roof. *Bergen*, *supra* at 377. The defendants' SDS disclosed that the roof had leaked in the past but asserted that it had been completely repaired. *Id*. at

378. The plaintiffs sued under theories of "fraud, negligent misrepresentation, and breach of contract arising out of defendants' alleged failure to disclose the leaking roof." *Id*. at 377. Finding no genuine issue of material fact existed regarding reliance, the trial court granted summary disposition to the defendants on the plaintiffs' claims of fraud and negligent misrepresentation.[2] *Id*. at 379-380. This Court reversed, but in doing so only discussed theories of liability based on fraudulent misrepresentation and silent fraud. *Id*. at 382. This Court held that the trial court erred in ruling that no material issue of fact remained for trial. *Id*. at 381, 389. In particular, the *Bergen* Court held that the plaintiffs had produced sufficient evidence to permit "a reasonable fact-finder [to] infer that [the] defendants knew about the leak yet proceeded in bad faith by impermissibly failing to disclose the condition." *Id*. at 388. Thus, the

[2] Plaintiffs did not assert negligent misrepresentation in this action, although in their original fraud count, plaintiffs asserted that defendants "knew, or should have known" the representations were false. In a negligent misrepresentation action, the plaintiff must prove that "a party justifiably relied to his detriment on information provided without reasonable care by one who owed the relying party a duty of care." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 33; 436 NW2d 70 (1989). Michigan recognized negligent misrepresentation as a way of imposing third-party liability for the negligent performance of a contract. See *Williams v Polgar*, 391 Mich 6, 18-23; 215 NW2d 149 (1974) (holding that an abstractor could be found liable to third parties for negligent preparation of an abstract when the abstractor could reasonably foresee the third parties relying on the accuracy of the abstract). Although we do not address such a claim because it was not pleaded here, we disagree with the *Bergen* Court that the SDA imposes a duty on a seller to exercise ordinary care to discover defects in a home being sold. See *Bergen, supra* at 385. The SDA only imposes a duty on the transferor of real estate covered by the act to honestly disclose items about which the transferor actually knows. See MCL 565.955(1) ("within the personal knowledge of the transferor"); MCL 565.956 ("and known to the transferor"); MCL 565.957 ("known by the seller"); and MCL 565.960 (requiring " 'good faith' mean[ing] honesty in fact").

plaintiffs in *Bergen* produced evidence of material facts to support claims of fraud or silent fraud but not innocent misrepresentation.

This Court, however, in several unpublished opinions has held that a claim of innocent misrepresentation based on disclosures required in an SDS is incompatible with the SDA. See *Paule*, *supra* at 4 ("[W]e hold that MCL 565.955(1) eliminated any claim based on innocent misrepresentation in the context of a claim premised on a misrepresentation contained in a disclosure statement, because personal knowledge or ordinary care is required by the statute."); *Timmons*, *supra* at 4 ("With respect to [the] plaintiffs' claim for innocent misrepresentation, . . . such a claim cannot exist under the SDA, because the act itself eliminates any claims based on innocent misrepresentation in reference to alleged misrepresentations within the SDS."); and *Pena, supra* at 3 n 1 ("[T]his Court expressly recognized that [MCL 565.955(1)] limits liability for error and omissions not within the seller's personal knowledge, *Bergen, supra* at 385, precluding 'innocent misrepresentation' claims under the SDA . . . ."). See also *Lane v Dinnocenzo*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 2006 (Docket No. 268370) at 2, holding with respect to the SDA that "a seller is not liable for any error, inaccuracy, or omission in the disclosure form if the error, inaccuracy, or omission was not within the seller's personal knowledge. MCL 565.957. A seller is liable for common law fraud or silent fraud if a seller makes misrepresentations in the disclosure form."

Unpublished opinions are not precedentially binding, and we need not consider them. MCR 7.215(C)(1). Several on this issue, however, are persuasive because they rely on the plain language of the statute. The SDA

modifies the common law and in certain real estate transactions requires the transferor to disclose certain information in a specified format. The act applies to "the transfer of any interest in real estate consisting of not less than 1 or more than 4 residential dwelling units . . . ." MCL 565.952. The SDA excepts certain transfers, such as those made pursuant to court order, familial transfers, transfers related to debt collection, mortgage foreclosure, bankruptcy proceedings, transfers by nonoccupant fiduciaries, and other similar transfers, none of which applies here. MCL 565.953. The SDA requires that the transferor of any real property covered by the act "shall deliver to the transferor's agent or to the prospective transferee or the transferee's agent the written statement required by this act." MCL 565.954(1). The form and substance of the written statement required by the act is set forth in MCL 565.957.[3] The transferor must complete the SDS by answering its questions in "good faith," i.e., with "honesty in fact in the conduct of the transaction." MCL 565.960.

We find nothing in the plain terms of the SDA that requires a transferor of property covered by the act to exercise ordinary care to discover defects in the property being transferred. While good faith and honesty are required when completing an SDS, "[i]f at the time the disclosures are required to be made, an item of information required to be disclosed under [the SDA] is unknown or unavailable to the transferor, the transferor may comply with this act by advising a prospective purchaser of the fact that the information is unknown."

[3] "A city, township, or county may require disclosures in addition to those disclosures required by [MCL 565.957], and may require disclosures on a different disclosure form in connection with transactions subject to [the SDA]." MCL 565.959.

MCL 565.956. Further, the SDS must be completed with "the best information available *and known to the transferor*." *Id*. (emphasis added). MCL 565.957 also explicitly provides that an SDS contains only information actually known to the transferor and that the SDS is not a warranty. MCL 565.957 states regarding the purpose of the SDS and the instructions for its completion, in pertinent part:

> **Purpose of Statement**: This statement is a disclosure of the condition of the property in compliance with the seller disclosure act. This statement is a disclosure of the condition and information concerning the property, *known by the seller*. Unless otherwise advised, the seller does not possess any expertise in construction, architecture, engineering, or any other specific area related to the construction or condition of the improvements on the property or the land. Also, unless otherwise advised, the seller has not conducted any inspection of generally inaccessible areas such as the foundation or roof. *This statement is not a warranty of any kind by the seller or by any agent representing the seller in this transaction*, and is not a substitute for any inspections or warranties the buyer may wish to obtain.
>
> **Seller's Disclosure**: The seller discloses the following information with the knowledge that even though *this is not a warranty*, the seller specifically makes the *following representations based on the seller's knowledge at the signing of this document*. Upon receiving this statement from the seller, the seller's agent is required to provide a copy to the buyer or the agent of the buyer. The seller authorizes its agent(s) to provide a copy of this statement to any prospective buyer in connection with any actual or anticipated sale of property. The following are representations made solely by the seller and are not the representations of the seller's agent(s), if any. **THIS INFORMATION IS A DISCLOSURE ONLY AND IS NOT INTENDED TO BE A PART OF ANY CONTRACT BETWEEN BUYER AND SELLER**.

> **Instructions to the Seller**: (1) Answer ALL questions. (2) *Report known conditions affecting the property*. (3) Attach additional pages with your signature if additional space is required. (4) Complete this form yourself. (5) If some items do not apply to your property, check NOT AVAILABLE. If you do not know the facts, check UNKNOWN. [Emphasis added.]

In sum, the SDA requires a transferor of certain real property to answer all items required by MCL 565.957 honestly, on the basis of information actually known to the transferor at the time the SDS is completed. *Id*.; MCL 565.956; MCL 565.960. Thus, the SDA creates a duty of disclosure regarding specified items. MCL 565.954(1); MCL 565.957; *Bergen*, *supra* at 385. Further, the inclusion of items for disclosure in the SDS "does not limit or abridge any obligation for disclosure created by any other provision of law regarding fraud, misrepresentation, or deceit in transfer transactions." MCL 565.961. That is, apart from the SDS, the Legislature has not modified the rule of *caveat emptor* and its common-law exceptions imposing liability for fraud. What the Legislature has done is set forth specific provisions limiting a transferor's potential liability for any errors, inaccuracies, or omissions regarding disclosures required by the SDA by providing:

> (1) The transferor or his or her agent is not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission *was not within the personal knowledge of the transferor*, *or* was based entirely on information provided by public agencies or provided by other persons specified in subsection (3), *and ordinary care was exercised in transmitting the information*. It is not a violation of this act if the transferor fails to disclose information that could be obtained only through inspection or observation of inaccessible portions of real estate or could be discovered only by

> a person with expertise in a science or trade beyond the knowledge of the transferor.
>
> (2) The *delivery of any information* required by this act to be disclosed to a prospective transferee by a public agency or other person specified in subsection (3) shall be considered to comply with the requirements of this act and relieves the transferor of any further duty under this act with respect to that item of information, *unless the transferor has knowledge of a known defect or condition that contradicts the information* provided by the public agency or the person specified in subsection (3).
>
> (3) The *delivery of a report or opinion* prepared by a licensed professional engineer, professional surveyor, geologist, structural pest control operator, contractor, or other expert, dealing with matters within the scope of the professional's license or expertise, *is sufficient compliance for application of the exemption provided by subsection* (1) if the information is provided upon the request of the prospective transferee, *unless the transferor has knowledge of a known defect or condition that contradicts the information contained in the report or opinion*. In responding to a request by a prospective transferee, an expert may indicate, in writing, an understanding that the information provided will be used in fulfilling the requirements of [MCL 565.957] and, if so, shall indicate the required disclosures, or parts of disclosures, to which the information being furnished applies. In furnishing the statement, the expert is not responsible for any items of information other than those expressly set forth in the statement. [MCL 565.955 (emphasis added).]

We agree with the *Bergen* Court that "it is evident that the Legislature intended to allow for seller liability in a civil action alleging fraud . . . brought by a purchaser on the basis of misrepresentations or omissions in a disclosure statement, but with some limitations."[4]

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[4] To the extent *Bergen* implies otherwise, we find the reasoning of *Pena, supra* at 1-3, persuasive in determining that the SDA does not create a separate cause of action for the violation of its terms but instead

Bergen, *supra* at 385. The first and foremost limitation on a transferor's liability is found in the first half of the first sentence of MCL 565.955(1). "The transferor or his or her agent is not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission was not within the personal knowledge of the transferor . . . ." *Id*. As stated by this Court in *Bergen*, *supra* at 385: "Liability is precluded for errors, inaccuracies, or omissions in a seller disclosure statement that existed when the statement was delivered where the seller lacked personal knowledge" of the error, inaccuracy, or omission.

The second half of the first sentence of subsection 1 of MCL 565.955, read together with subsections 2 and 3, provide a second limitation on a transferor's liability. Specifically, a transferor may not be found liable for errors, inaccuracies, or omissions in an item disclosed in a SDS when the transferor's answer is "based entirely on information provided by public agencies or provided by other persons specified in subsection (3), and ordinary care was exercised in transmitting the information."[5] MCL 565.955(1). Persons specified in subsection 3 include "licensed professional engineer, professional

affords buyers an opportunity to cancel a purchase agreement before closing or thereafter allows for a common-law action for fraud. Because plaintiffs only assert a claim alleging innocent misrepresentation, we do not decide the issue.

[5] Although not necessary to decide this issue, it appears the *Bergen* Court read into the phrase in MCL 565.955(1) "and ordinary care was exercised in transmitting the information" a duty on the part of the transferor to use ordinary care to discover defects requiring reporting in the SDS. But the phrase requires ordinary care only in "transmitting the information," not discovering information. Definitions of "transmit" in *Random House Webster's College Dictionary* (1992) include: (1) "to send or forward, as to a recipient or destination; dispatch; convey" and (2) "to communicate, as information, or news." Thus, even if the phrase "and ordinary care was exercised in transmitting the information" also modi-

surveyor, geologist, structural pest control operator, contractor, or other expert, dealing with matters within the scope of the professional's license or expertise . . . ." MCL 565.955(3). Consequently, when the transferor satisfies the SDA's duty of disclosure regarding an SDS item by basing disclosure entirely on information provided by a public agency or qualified expert, the transferor is not liable for any error, inaccuracy, or omission in the provided information when it is transmitted with ordinary care, unless the transferor has knowledge of a known defect or condition that contradicts the information. In other words, when the transferor has knowledge of errors, inaccuracies, or omissions with respect to information from a public agency or an expert's report or opinion, providing such information, report, or opinion will not satisfy the SDA's duty of disclosure, MCL 565.955(2), nor will the transferor be exempt from potential common-law liability, MCL 565.955(1) and (3).

In sum, the SDA only requires a transferor to honestly disclose information known to the transferor at the time the SDS is completed. MCL 565.956; MCL 565.957. Further, a transferor may not be held liable for any errors, inaccuracies, or omissions in the SDS unless they were within the transferor's personal knowledge. MCL 565.955(1). The SDA expressly states that the transferor "is not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission was *not within the personal knowledge* of the transferor" and ordinary care was used in transmitting the information. *Id*. (emphasis added). But the act also states that "[t]he specification of items for disclosure in this act does not

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fies the first half of the first sentence of MCL 565.955(1), it requires only that a transferor use ordinary care in communicating his or her actual knowledge.

limit or abridge any obligation for disclosure created by any other provision of law regarding fraud, misrepresentation, or deceit in transfer transactions." MCL 565.961. Considered together, these two sections mean that where an item is specified for disclosure on the SDS, a transferor may be liable for fraud or silent fraud if the elements of those causes of action are proved, including that the transferor possessed personal knowledge about the item but failed to exercise "good faith" by disclosing that knowledge. MCL 565.960; *Bergen*, *supra*. Correspondingly, a transferor cannot be found liable for an innocent misrepresentation regarding a disclosure required by the act because an innocent misrepresentation claim would allow liability for erroneous information even if the transferor lacked personal knowledge that the information was false and was acting in good faith. *United States Fidelity & Guaranty Co*, *supra* at 117.

We hold that innocent misrepresentation is incompatible with the exemption from liability afforded by MCL 565.955(1) with respect to a disclosure made on an SDS. Because liability for an innocent misrepresentation may be imposed without regard to whether the party making the representation knew it was false or was acting in good faith and because MCL 565.955(1) precludes imposition of liability on transferors who lack personal knowledge with respect to errors, inaccuracies, or omissions in an SDS, there is no liability for a disclosure made on an SDS under a theory of innocent misrepresentation. By permitting plaintiffs' innocent misrepresentation claim, the trial court failed to recognize the statutory exemption from liability when transferors lack personal knowledge of errors in the SDS. Consequently, plaintiffs' pleadings regarding innocent misrepresentation fail to state a claim upon which relief can be granted, and no factual development could

possibly justify recovery. *Corley*, *supra* at 277. The trial court erred in not granting defendants' motion for summary disposition on that claim.

We reverse and remand for entry of judgment for defendants. We do not retain jurisdiction.

WILDER, J., concurred.

WHITE, J. (*dissenting*). I respectfully dissent. The majority reverses on the basis that there can be no claim for innocent misrepresentation under the Seller Disclosure Act (SDA), MCL 565.951 *et seq*. Nowhere in defendants' brief or reply brief, however, is this argument made. Although defendants raised the issue below,[1] it is not raised on appeal because the case defendants lost at the trial in this matter was not an innocent misrepresentation case. Rather, the issue presented to the jury was whether defendants knew of the termite infestation and intentionally withheld the information from plaintiffs. Notwithstanding the terms used at trial, this is not innocent misrepresentation. On appeal, defendants challenge whether the evidence was sufficient to support these findings and whether the court wrongly barred evidence that would have supported defendants' position that they had no knowledge. Even during argument in this court, defendants conceded that these are the issues.

The unpublished cases the majority relies on are factually and procedurally different from the instant case. This case was litigated and tried with the jury being informed of the limitations on potential liability under the SDA. The issues of defendants' knowledge and their credibility in denying such knowledge, as well

[1] Before trial, the trial court stated on the record that defendants could again raise the issue in a motion for a directed verdict.

as their good faith, were properly submitted to the jury, and there was ample evidence from which the jury could have concluded that defendants had knowledge of the infestation and did not act in good faith in completing their seller's disclosure statement under the SDA.

I would affirm.

MARTIN v SECRETARY OF STATE

Docket No. 286015. Submitted July 29, 2008, at Lansing. Decided August 21, 2008, at 9:20 a.m. Reversed in part, 482 Mich 956.

Christopher P. Martin filed a nominating petition with the Bureau of Elections, Department of State, seeking to be placed on the ballot as a candidate for judge of the 23rd Judicial Circuit. Following a challenge based on an insufficient number of signatures on the petition, Martin attempted to submit additional signatures, which the bureau refused to accept because the filing deadline had passed. Martin and three persons who had signed his nominating petition brought an action in the Ingham Circuit Court against the Secretary of State, the director of the bureau, and the Board of State Canvassers, alleging that the Secretary of State had incorrectly advised Martin of the number of signatures required under MCL 168.544f and seeking injunctive relief. Twenty-third Judicial Circuit Judge Ronald M. Bergeron, who had challenged Martin's petition, and 23rd Judicial Circuit Judge William F. Myles, sought to intervene, arguing that they had an interest in the matter because of the possibility that an uncontested election could become a contested one. The court, William E. Collette, J., denied the motion to intervene and ordered the Secretary of State to extend the filing deadline and place Martin on the ballot if he filed sufficient additional signatures. Myles and Bergeron filed a claim of appeal and also filed a bypass application for leave to appeal in the Supreme Court. The Supreme Court denied the application, but ordered the Court of Appeals to issue a decision by a specific date. 481 Mich 943 (2008). The Court of Appeals treated the claim of appeal as an application for leave to appeal and granted it.

The Court of Appeals *held*:

A candidate for judicial office has not suffered an injury, and therefore is not an aggrieved party and does not have standing under MCR 7.203(A), solely because the candidate is required to run in a contested election. While Myles and Bergeron have an interest in the subject matter of the litigation, they have not satisfied the requirement for standing of a concrete and particularized injury.

Affirmed.

O'CONNELL, P.J., dissenting, disagreed that Myles and Bergeron lack standing. They were wrongfully denied the opportunity to intervene in this case in their capacities as private citizens and as candidates for public office. Thus, Myles and Bergeron are aggrieved parties and have standing to intervene. The trial court further erred by applying equity and ordering the Secretary of State to extend the filing deadline. Moreover, estoppel does not apply to the plaintiffs' claims. MCL 168.544f clearly indicates the signature requirements for a nominating petition for judicial office in the 23rd Judicial Circuit and Martin had a duty to follow those requirements. The trial court's order should be vacated.

Dykema Gossett PLLC (by *Gary P. Gordon*, *W. Alan Wilk*, and *Jason T. Hanselman*) for Christopher P. Martin and others.

Kienbaum Opperwall Hardy & Pelton, P.L.C. (by *Eric J. Pelton* and *Noel D. Massie*), for William F. Myles and Ronald M. Bergeron.

Before: O'CONNELL, P.J., and OWENS and BORRELLO, JJ.

BORRELLO, J. Appellants, 23rd Circuit Court Judges William F. Myles and Ronald M. Bergeron, appeal the trial court's June 10, 2008, injunction, by which the trial court ordered the Secretary of State to accept additional nominating petition signatures on behalf of plaintiff Christopher P. Martin until 4:00 p.m. on June 12, 2008, and to place Martin on the ballot as a candidate for judge of the 23rd Circuit Court if he filed sufficient valid signatures by that deadline. We affirm.

I. FACTS AND PROCEDURAL HISTORY

The facts giving rise to this appeal are not in dispute. Martin sought to run for the office of judge of the 23rd Circuit Court. MCL 168.413 establishes the requirements for nominating petitions for candidates for circuit court judges:

> To obtain the printing of the name of a person as a candidate for nomination for the office of judge of the circuit court upon the official nonpartisan primary ballots, there shall be filed with the secretary of state nominating petitions containing the signatures, addresses, and dates of signing of a number of qualified and registered electors residing in the judicial circuit as determined under [MCL 168.544f] . . . . The secretary of state shall receive the nominating petitioners up to 4 p.m. of the fourteenth Tuesday preceding the primary.

MCL 168.544f imposes a graduated scale for the number of signatures required on the nominating petitions that is based on the population of the district. Before April 1, 2003, the 23rd Judicial Circuit was made up of Iosco and Oscoda counties and included one judge. 2002 PA 92 amended MCL 600.524 by restructuring the 23rd Judicial Circuit to include Alcona, Arenac, Iosco, and Oscoda counties and add one judge. With the additional counties, the 23rd Judicial Circuit has an estimated population of 65,745. Under MCL 168.544f, the minimum number of signatures required on a nominating petition for an individual seeking to be a judicial candidate for the 23rd Judicial Circuit is 200, and the maximum number of signatures on the nominating petition is 400.

MCL 600.550(1) requires the State Court Administrator's Office (SCAO) to notify the Bureau of Elections "with respect to each new circuit judgeship authorized pursuant to this subsection." This notice requirement is triggered when the county board of commissioners of each affected county approves the creation of the judgeship by resolution and files a copy of the resolution with SCAO. MCL 600.550(1). However, MCL 600.550a(4) eliminated the requirement of approval by the county board of commissioners for certain judicial circuits that were restructured, including the 23rd Judicial Circuit,

thus rendering virtually inoperable SCAO's notification obligation under MCL 600.550(1). The Bureau of Elections, which publishes signature requirements, was thus not notified of the change in the 23rd Judicial Circuit, and it provided erroneous information about the signature requirement for candidates seeking a judgeship in the 23rd Judicial Circuit, indicating that it was 100 to 200 signatures rather than the 200 to 400 signatures required by MCL 168.544f. The Secretary of State published this erroneous information, and it appeared on the Secretary of State's website.

According to affidavits submitted by Martin, he or individuals associated with his campaign made at least two calls to the Secretary of State in April 2008 to verify the number of signatures necessary to get his name on the ballot for the position of judge of the 23rd Judicial Circuit, and on both occasions the Secretary of State informed them that Martin needed to submit between 100 to 200 signatures and that submission of more than 200 signatures was a crime. In addition, a document entitled "Filing Requirements for Non-Incumbent Judicial Candidates" contained the same inaccurate information regarding the number of signatures required for the 23rd Judicial Circuit. In his affidavit, Christopher M. Thomas, Director of the Bureau of Elections, asserted that "[t]his publication has been posted on the Department of State's website and sent directly to candidates."[1] Relying on the Secretary of State's erroneous information regarding the number of signatures required, Martin filed 158 signatures with the Bureau of Elections on April 23, 2008. On May 1, 2008, after the April 29, 2008, deadline for gathering signatures and

[1] It is unclear from the record if the Bureau of Elections sent Martin this document, but Martin asserts in his affidavit that he viewed the document on the Bureau of Elections' website.

filing petitions had passed, Bergeron filed a challenge to Martin's eligibility to have his name placed on the ballot, arguing that Martin's petitions had an insufficient number of signatures and therefore failed to comply with MCL 168.544f. On May 5, 2008, Martin attempted to submit 208 additional signatures, but the Bureau of Elections refused to accept the signatures because the deadline had passed. On May 15, 2008, the Bureau of Elections sent Martin a letter informing him that he was ineligible to have his name listed as a candidate on the primary ballot because his petition contained less than 200 signatures and was therefore insufficient on its face.

Plaintiffs filed this action in the circuit court on May 30, 2008, against the Secretary of State, the Director of the Bureau of Elections, and the Board of State Canvassers, requesting a temporary restraining order, a preliminary injunction, and, after a final hearing, a permanent injunction enjoining the Secretary of State from excluding Martin from the ballot. Plaintiffs also sought orders of mandamus against the Board of State Canvassers and the Secretary of State and alleged violations of plaintiffs' First Amendment rights and the due process clauses of the United States and Michigan constitutions, negligent misrepresentation, promissory estoppel, and entrapment by estoppel. A hearing was set for June 10, 2008. On June 9, 2008, appellants filed an emergency motion to intervene, arguing that they had "an obvious interest in whether an otherwise uncontested election becomes a contested election, by virtue of the relief Martin requests in this lawsuit."

At the June 10, 2008, hearing, the trial court considered appellants' motion to intervene, as well as plaintiffs' complaint. Appellants asserted that they were entitled to intervene under MCR 2.209(A)(3) and con-

tended that their interests would not necessarily be protected by the existing defendants, noting that the Secretary of State had indicated that it would not appeal a ruling that was contrary to appellants' interests. Defendants did not object to appellants' attempt to intervene in the matter. However, plaintiffs asserted that appellants' motion to intervene was untimely. Plaintiffs also argued that appellants had failed to demonstrate that they would not be adequately represented by the existing defendants, observing that the Attorney General had undertaken an aggressive defense of the matter and had filed an extensive brief. The trial court denied the motion to intervene, stating that appellants did not have standing to intervene because the litigation involved whether the court "should issue a writ of mandamus against the Secretary of State. It is not directed at [appellants.]" In an order dated June 25, 2008,[2] the trial court stated: "Incumbents' Motion to Intervene is denied because the Incumbents have not satisfied the requirements set forth in MCR 2.209(A)(3) for the reasons discussed on the record." The trial court further ordered the Secretary of State to extend the deadline for filing nominating petition signatures until 4:00 p.m. on June 12, 2008, and if sufficient signatures were filed, to place Martin's name on the ballot. Thereafter, Martin acquired sufficient signatures, and the

[2] We note that the court did not enter the order denying the motion to intervene until June 25, 2008, after appellants filed the claim of appeal. While appellants have provided this Court with that order as a supplement to their claim of appeal, they did not apply for leave to appeal that order or move this Court to amend the appeal. However, given the nature of the case, the time constraints placed on this Court, and the lack of argument from appellees on this issue, we exercise our discretion to treat appellants' claim of appeal as an application for leave to appeal, and we grant it. See *In re Investigative Subpoena re Homicide of Lance C Morton*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003).

Secretary of State placed his name on the November 4, 2008, ballot for the position of judge of the 23rd Circuit Court.

Appellants filed their claim of appeal on June 17, 2008, along with motions to expedite, to waive the requirements of MCR 7.209, for immediate consideration, for peremptory reversal, and for a stay. In a June 20, 2008, order, this Court granted immediate consideration and appellants' motion to waive the requirements of MCR 7.209, but denied peremptory reversal or a stay. In a June 27, 2008, order, this Court granted the motion to expedite and directed the parties to address whether appellants are aggrieved parties within the meaning of MCR 7.203(A). Shortly thereafter, appellants filed a bypass application for leave to appeal in the Michigan Supreme Court. In an order dated July 9, 2008, our Supreme Court denied the application, but ordered this Court to issue a decision in this case no later than August 21, 2008.

II. ANALYSIS

We first address whether appellants meet the definition of "aggrieved party" under MCR 7.203(A). The concepts of standing and whether an individual is an aggrieved party are closely related. See *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290-291; 715 NW2d 846 (2006). Whether a party has standing is a question of law, which we review de novo. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001). "In order to have appellate standing, the party filing an appeal must be 'aggrieved.' " *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008); see *Federated Ins Co*, 475 Mich at 290-291; MCR 7.203(A).

This court "has jurisdiction of an appeal of right filed by an *aggrieved party* from" a final order or judgment of

the trial court. MCR 7.203(A) (emphasis added). In *Federated Ins Co*, the Supreme Court clarified the requirements for a party to be an aggrieved party under MCR 7.203(A):

> "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *In re Estate of Trankla*, 321 Mich 478, 482; 32 NW2d 715 (1948), citing *In re Estate of Matt Miller*, 274 Mich 190, 194; 264 NW 338 (1936). An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [*Federated Ins Co*, 475 Mich at 291-292.]

The Supreme Court's holding in *Federated Ins Co* regarding who is an aggrieved party under MCR 7.203(A) heightened the requirements to be an aggrieved party, thus rendering it more difficult for a party to invoke the jurisidiction of this Court. Before the Supreme Court decided *Federated Ins Co*, a litigant was an aggrieved party if the party's legal right was invaded by an action or the party's pecuniary interest was directly or adversely affected by a judgment or order. See *In re Critchell Estate*, 361 Mich 432, 448-449; 105 NW2d 417 (1960); *In re Freeman Estate*, 218 Mich App 151, 155; 553 NW2d 664 (1996). It was sufficient if a party had "an interest in the subject matter of the litigation." *In re Critchell Estate*, 361 Mich at 448; see also *In re Freeman Estate*, 218 Mich App at 155. After *Federated Ins Co*, to be "aggrieved," a party must have more than a mere interest in the subject matter of the proceedings below; the party "must have suffered a

concrete and particularized injury . . . ." *Federated Ins Co*, 475 Mich at 291. A "minute and generalized" injury is not concrete and particularized. *Rohde v Ann Arbor Pub Schools*, 479 Mich 336, 354; 737 NW2d 158 (2007).

Appellants argue that they have suffered a concrete and particularized injury because they must endure a contested judicial election with an opponent who has not met the statutory requirements to properly be on the ballot and this will require them to make significant financial expenditures. Clearly, appellants, as incumbent judges, have an interest in the subject matter of the litigation, because the results of such litigation would determine whether they run unopposed in the November 2008 election or face a challenger. However, we are unwilling to conclude as a matter of law that a candidate for elected office is an aggrieved party solely by virtue of being required to run for elected office in a contested election. In support of our conclusion in this regard, we note that we have previously recognized that "the definition of 'aggrieved party' varies according to the type of case at issue, and, consequently, the court must in each case examine the subject matter of the litigation." *Security Ins Co of Hartford v Daniels*, 70 Mich App 100, 105; 245 NW2d 418 (1976). The subject matter of the instant case concerns an attempt by appellants, as incumbent judges, to keep a potential challenger off the ballot. This Court has recognized that

> [t]here is a fundamental difference between actions taken to get a candidate's name on the ballot and actions taken to prevent it from appearing. Associating for the purpose of getting a candidate's name or a legislative proposal on the ballot is protected activity under the First Amendment; conspiring for the purpose of having it removed is not. [*Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 504; 688 NW2d 847 (2004).]

While we certainly do not believe that appellants conspired to have Martin's name removed from the ballot, their attempt to bar Martin from appearing on the ballot is the subject matter of the litigation. We decline to hold as a matter of law that a candidate for elective office is an aggrieved party by virtue of facing a contested election for that office when the nature of the litigation involves the candidate's attempt to bar a potential challenger from appearing on the ballot. We acknowledge that our holding in this regard effectively denies appellants access to the courts. While we would not be inclined to close the courthouse doors in this manner to a party who was seeking to get a candidate's name on the ballot, we do not so zealously protect parties who seek to prevent a candidate's name from appearing on the ballot. In this case, appellants are understandably disappointed about the fact that Martin's appearance on the ballot will require them to engage in a considerably more difficult and more expensive contested election rather than run unopposed for the judicial seats they seek. However, a party who is merely disappointed over a result is not an aggrieved party. *Federated Ins Co*, 475 Mich at 291.

Even if we were inclined to conclude that appellants are aggrieved parties under MCR 7.203(A), however, appellants have not satisfied the requirement of a concrete and particularized injury established by the Supreme Court in *Federated Ins Co*, 475 Mich at 291. At most, appellants have established the possibility of being faced with uncertain and unspecified expenditures as a result of campaigning in a contested election. According to appellants, Martin's name on the ballot "inevitably will put [appellants] to significant expense." Even if this is true, such undefined significant expenses do not constitute a concrete and particularized injury under *Federated Ins Co* because appellants have not

specified, articulated or explained the nature of the significant expenses (whether such expenses would be necessary for television or radio advertisement, signs or brochures, or some other expenses) or the amount of those expenses. We conclude that any injury to appellants in this case is uncertain and unparticularized; therefore, appellants have failed to establish a concrete and particularized injury, as required by *Federated Ins Co*.

Appellants have not cited any caselaw from Michigan or another jurisdiction in which a court has held that being a candidate in a contested election for public office renders an individual an aggrieved party. In support of their argument that they will suffer an injury if they are forced to make financial expenditures[3] to engage in a contested election, appellants rely on two federal cases: *Daggett v Comm on Governmental Ethics & Election Practices*, 172 F3d 104, 108 (CA 1, 1999), and *Marshall v Meadows*, 921 F Supp 1490 (ED Va, 1996). We conclude that these cases are distinguishable from this case in that neither federal case decides whether a person is an aggrieved party under MCR 7.203(A) or a similar statute or court rule and neither case holds that an incumbent elected official suffers a concrete and particularized injury by virtue of having to make financial expenditures to campaign in a contested election. Thus, we are not persuaded by appellants' reliance on these cases.

Appellants also argue that as citizens they have standing to ensure that the elections laws of the state of Michigan are properly enforced and that they are aggrieved parties if they are denied the opportunity to

[3] We note that appellants have not provided any documentation to demonstrate that they have expended any funds on behalf of their reelection campaigns, nor is there any mandate that they do so.

ensure that such laws are enforced. In support of this contention, appellants rely primarily on this Court's decision in *Deleeuw*. In *Deleeuw*, Republican Party operatives, including plaintiff Deleeuw, were seeking to place Ralph Nader's name on the Michigan ballot for President of the United States in the November 2004 election. We ruled that the plaintiffs had standing in that action because they had circulated, signed, and filed the nominating petitions on behalf of Ralph Nader, thereby giving them a legally protected interest for this Court to enforce. In so ruling, we opined:

> Normally, courts require citizens to resort to the election process to vent any frustration. Election cases are special, however, because without the process of elections, citizens lack their ordinary recourse. For this reason we have found that ordinary citizens have standing to enforce the law in election cases. Moreover, we are not dealing with ordinary citizens here. Collectively, plaintiffs duly circulated, signed, and filed petitions that the board would now mute by its inaction. Under these circumstances, plaintiffs possessed a legally protected interest in having their valid signatures effectuate their petition to qualify the named political candidate as mandated by law. [*Deleeuw*, 263 Mich App at 505-506 (citations omitted).]

If there was any question, in *Deleeuw* we clarified that questions of standing in election cases must be considered using the standing principles outlined in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004). In *Nat'l Wildlife*, Justice MARKMAN, writing for the majority, stated:

> At a minimum, standing consists of three elements:
>
> "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the

> conduct complained of—the injury has to be 'fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " [*Id.* at 628-629 (citation omitted).]

As we have observed previously in this opinion, the concepts of standing and aggrieved party are intertwined. For the same reasons that appellants did not establish that they suffered a concrete and particularized injury that rendered them aggrieved parties under MCR 7.203(A), we also conclude that they have failed to establish the first element in the standing analysis. Appellants have not suffered a legally cognizable injury by virtue of being forced to run in a contested judicial election. Additionally, we note that there is a significant factual distinction between this case and *Deleeuw*. In this case, appellants are attempting to prevent a candidate from appearing on the ballot, whereas in *Deleeuw* the plaintiffs were attempting to get an individual's name on the ballot. As this Court sagely observed in *Deleeuw*, this difference is critical: "There is a fundamental difference between actions taken to get a candidate's name on the ballot and actions taken to prevent it from appearing." *Deleeuw*, 263 Mich App at 504. In sum, *Deleeuw* stands for the proposition that the interests of the public are better served by having the names of candidates placed on the ballot rather than by removing them.

III. CONCLUSION

We share and agree with the concerns raised by the dissent that citizens possess the right to redress grievances involving elections through our courts. We emphasize that nothing in this opinion should be con-

strued to limit citizens' access to our courts to ensure that the election laws of this state are enforced. Rather, our opinion must be narrowly construed and limited to the unique facts of this case. This narrow holding stands solely for the conclusion that pursuant to the dictates set forth by our Supreme Court in *Federated Ins Co* and *Nat'l Wildlife*, a candidate for judicial office has not suffered an injury and therefore is not an aggrieved party and does not have standing solely because the candidate is required to run in a contested judicial election. Because we conclude that appellants are not aggrieved parties under MCR 7.203(A) and have failed to articulate a legally cognizable right granting them standing in this matter, we need not address any additional arguments advanced by the parties.

Affirmed. No costs, a public question having been involved.

OWENS, J., concurred.

O'CONNELL, P.J. (*dissenting*). The majority concludes that appellants are not aggrieved parties and, therefore, lack standing as Michigan citizens to intervene in the underlying election dispute in this case. I respectfully disagree. I believe that appellants were wrongfully denied their opportunity to intervene in this case, both in their capacities as private citizens and as candidates for public office. By concluding otherwise, the majority has essentially determined that Michigan citizens do not automatically have standing to ensure that the election laws of this state are properly enforced. Further, although the majority did not address the issue, I also conclude that the trial court erred when it ordered the Secretary of State to extend the filing deadline to give plaintiff Christopher P. Martin the opportunity to file additional nominating petition signatures and to

allow his name to appear on the ballot. I would vacate the trial court's order and affirm the decision of the Secretary of State.[1]

First, I disagree with the trial court's conclusion that appellants were not aggrieved parties and, therefore, lacked standing to intervene in this case. In a confusing decision, the trial court concluded that appellants attempted to intervene because they would have to campaign in a contested election if Martin was placed on the ballot, but appellants were not aggrieved parties and their status as judicial candidates was insufficient to confer standing. The majority agrees. I do not. The trial court's conclusion that a person running for public office does not have an interest in the election or is not an aggrieved party in litigation designed to add or subtract names from the ballot is clearly erroneous. I can think of no greater aggravation as an incumbent candidate than running in a contested election and risking the loss of a job. Further, the contested or uncontested nature of an election affects the manner in which the candidate runs his campaign and affects the amount of time and money that a candidate must invest in order to run a successful campaign. If a campaign is contested, it is axiomatic that a candidate will need to spend more time and money on the election (preparing mailings and yard signs, making speeches, etc.), not only to make his candidacy more widely known, but also to highlight the differences between himself and his opponent and showcase the reasons why voters should

[1] I concur with the majority opinion that appellants filed an appeal as of right and that their claim should have been filed as an application for leave to file their appeal. However, because of the time constraints, and for the sake of judicial economy, we have exercised our discretion to treat appellants' claim of appeal as an application for leave to appeal and have granted it. See *In re Investigative Subpoena re Homicide of Lance C Morton*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003).

elect him instead of his opponent. In my opinion, the proper application of the election laws at issue will affect appellants' job security and the nature of the campaigns they must run. Clearly, appellants are aggrieved parties.

In addition, the trial court incorrectly focused solely on appellants' status as judicial candidates and completely disregarded their status as voters in the district with a direct interest in the proper application of the election laws being upheld. Plaintiffs argue that appellants' status as voters is irrelevant because they have suffered no harm that the general public did not suffer. However, this Court has recognized that "[e]lection cases are special . . . because without the process of elections, citizens lack their ordinary recourse." *Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 505–506; 688 NW2d 847 (2004). Because the improper implementation of election laws affects the process by which citizens normally exercise their collective voice to uphold the status quo or effectuate change, "ordinary citizens have standing to enforce the law in election cases."[2] *Id.* at 506. See also *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987) (holding that the plaintiffs in an election case "were not required to show a substantial injury distinct from that suffered by the public in general"). "[T]he right to vote is an implicit ' "fundamental political right" ' that is ' "preservative of all rights." ' " *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 16; 740 NW2d 444 (2007) (citation omitted). Further, the Legislature has the power and responsibility to "preserve the purity of elections" and "guard against abuses of the elective franchise . . . ."

[2] It is undisputed that appellants are not only candidates for election to the 23rd Circuit Court, but are also voters and ordinary citizens.

Const 1963, art 2, § 4. Given that this case concerns a trial court's application of equity to enter an injunction that permits an end run around election laws, appellants, in their capacity as ordinary citizens and voters, have suffered an injury and have standing to bring their claim to remedy this injury. *Helmkamp*, *supra* at 445. Having suffered an injury as a result of the trial court's actions, appellants are aggrieved parties.[3] *Manuel v Gill*, 481 Mich 637, 643-644; 753 NW2d 48 (2008).

The majority opinion, knowingly or unknowingly, creates two classes of citizens who may bring lawsuits to enforce Michigan's election laws. The first consists of those who want to bring a lawsuit to enforce Michigan's election laws in order to place a candidate's name on the ballot. The second consists of those who want to bring a lawsuit to enforce Michigan's election laws in order to deny a candidate a position on the ballot. Both classes of citizens have the same goal, i.e., to see that Michigan's election laws are properly administered. Remarkably, the majority opinion grants standing to one class and denies standing to the other. The majority claims that this Court's opinion in *Deleeuw*, supports its position, but the distinction that the majority makes in this case is not found in *Deleeuw*. Although *Deleeuw* addresses the issue of standing, it does not do so in a context similar to that found in this case. *Deleeuw*, *supra* at 502-507. Rather, the *Deleeuw* Court determined that a party who was not formally affiliated with an election campaign, yet was collecting signatures to get a candi-

[3] I note that MCR 7.203(B), which provides for jurisdiction for appeal by leave, does not include the "aggrieved party" language found in MCR 7.203(A). Thus, under a strict interpretation of the court rule, it would appear that status as an aggrieved party is not required for an appeal by leave. However, because our Supreme Court has ruled that appellate standing requires one to be aggrieved, *Manuel, supra* at 643-644, we must address this issue.

date's name on the ballot, had standing pursuant to MCL 168.590(3) to seek a mandamus action asking this Court to compel the Board of State Canvassers to certify the petition to place the candidate on the ballot. *Id.* at 503.

Granted, the *Deleeuw* Court noted that "[a]ssociating for the purpose of getting a candidate's name or a legislative proposal on the ballot is protected activity under the First Amendment; conspiring for the purpose of having it removed is not." *Id.* at 504. However, this case involves neither allegations of associating to place a candidate's name on the ballot nor conspiring to take it off. Rather, this case commenced because plaintiffs wanted to place Martin's name on the ballot for election to the 23rd Circuit Court, and appellants sought to intervene to ensure that election laws were properly followed. Therefore, I do not believe that *Deleeuw* supports the majority's conclusion that a citizen's standing in an election case varies depending on whether his substantive argument in support of the proper application of an election law would result in a candidate being placed on or taken off the ballot. Conversely, I conclude that all parties to this litigation have standing to ensure that the elections laws of the state of Michigan are properly enforced. To rule otherwise would discriminate against an entire class of citizens attempting to enforce our election laws.

Because the trial court determined that appellants were not aggrieved parties and did not permit them to intervene in this case, it did not consider any substantive arguments by appellants questioning the merits and propriety of its action when it decided that equity dictated permitting Martin to submit additional nominating signatures in order to be placed on the ballot as a candidate. However, because appellants should have

been permitted to intervene, the trial court erred when it failed to give them a voice in this proceeding. For this reason, the trial court should have permitted appellants to intervene and should have considered appellants' arguments before ruling on substantive issues regarding whether to give Martin a chance to appear on the ballot.

Notably, the majority does not address whether the trial court erred when it determined that equity dictated giving Martin the chance to appear on the ballot. Presumably, the majority determined that its conclusion that appellants lacked standing meant that it did not need to address the trial court's substantive ruling. However, because I have concluded that appellants have standing and should have been permitted to intervene in this case, and because the majority's affirmation of the trial court's decision to the contrary means that a situation will not occur in which the trial court could revisit its decision to give Martin an opportunity to appear on the ballot, I believe that it is necessary to address appellants' argument that the trial court's ultimate decision in this case, a decision in which appellants were improperly denied a voice, was erroneous.

MCL 168.544f provides a chart detailing the number of signatures required depending on the population of the district in the last federal census and whether the petition is partisan, nonpartisan, or qualifying. The 23rd Judicial District is made up of Alcona, Arenac, Iosco, and Oscoda counties. Their respective populations in the 2000 census were 11,719, 17,269, 27,339, and 9,418 individuals, resulting in a total population of 65,745. For a population between 50,000 and 74,999, 200 to 400 signatures are required for a nonpartisan

petition. MCL 168.544f. Because Martin submitted his petition with only 158 signatures, it was insufficient to place him on the ballot.

Plaintiffs argue that Martin was placed in a Catch-22 because he had received an instruction from the Secretary of State indicating that he should file his petition with 100 to 200 signatures and was required to follow that instruction pursuant to MCL 168.931(1)(h). Thus, he either had to ignore the instruction and be subject to misdemeanor prosecution or ignore MCL 168.544f and risk not being placed on the ballot. I disagree with plaintiffs' claim of forced duality. Even under the erroneous instruction, Martin was permitted to submit a maximum of 200 signatures. Had he done so, he would have met the minimum number of signatures necessary under the proper calculation. Thus, he could have complied with both the instruction and the proper statutory calculation.

However, moving beyond the simple math, MCL 168.931(1)(h) required Martin to "not wilfully- . . . disobey a lawful instruction or order of the secretary of state . . . ." Because the instruction requiring the submission of 100 to 200 signatures was contrary to the clear language of MCL 168.544f, it was not a lawful instruction, and Martin was not required to follow it. Had Martin taken the time to calculate the correct number of signatures required under MCL 168.544f, he would have been able to conclude that the instruction from the Secretary of State was erroneous and, therefore, need not be followed. If Martin had truly felt forced under these circumstances,[4] he should have called the discrepancy to the attention of the Secretary of State and filed the number of signatures he thought

[4] I say "if" because plaintiffs concede in their brief that Martin was unaware of the higher signature requirement in MCL 168.544f at the

appropriate. Contrary to plaintiffs' assertions, this would not have been unlawful behavior. Under MCL 168.548, it is unlawful to "wilfully and intentionally procure more signatures upon nominating petitions than the maximum number prescribed in this act." Had Martin explained that his calculation required the submission of 200 to 400 signatures under MCL 168.544f, then his submission would not have been unlawful under MCL 168.548 because it would not have been a willful and intentional submission of signatures over the maximum amount, but a willful and intentional attempt to comply with the statutory requirements.

Plaintiffs argue that Martin "relied on the instructions and verbal confirmations and presumed that they were correct." This argument reads as an estoppel argument, and I will treat it as such. I do not believe that estoppel is available, because caselaw only refers to estoppel against a *local unit of* government, see *Parker v West Bloomfield Twp*, 60 Mich App 583, 591; 231 NW2d 424 (1975), and defendants are officers of the state of Michigan. However, even assuming that estoppel could be applied in this situation, Martin must show not only good-faith reliance on the defendants' conduct, but also "lack of actual knowledge *or lack of the means of obtaining actual knowledge of the facts in question* . . . ." *Id.* at 592 (emphasis added). Martin had access to the statutes and census information and could have properly calculated the number of signatures needed to appear on the ballot. Therefore, estoppel is not appropriate.

Although I sympathize with Martin, I must conclude that the trial court erred in applying equity in this

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time of his filing. Thus, the Catch-22 is merely a theoretical argument constructed after the fact, rather than an actual explanation for Martin's behavior.

situation. Equity only applies in the absence of a specific statutory mandate. See *Stokes v Millen Roofing Co*, 466 Mich 660, 672; 649 NW2d 371 (2002). " '[I]t is not [a court's] place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree.' " *Id.*, quoting *Stokes v Millen Roofing Co*, 245 Mich App 44, 58; 627 NW2d 16 (2001). This should be particularly true of election law. If this Court were to erode the statutory requirements of election law through the use of equity, we would create ambiguity and inconsistency in what needs to be a uniform and stable area of law. Once one exception is created, the very foundation of our form of government can be questioned and our citizens may lose faith. MCL 168.544f clearly indicated the signature requirements for Martin's judicial nomination petition, and Martin had a duty to follow them.[5] Because he did not submit the required number of signatures by the statutory deadline, he should not have been given an extra opportunity to be placed on the ballot. Holding otherwise invites the destruction of our citizens' faith in our electoral process.

I would vacate the trial court's order and affirm the decision of the Secretary of State.

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[5] At oral argument, claims were made that the statute is difficult to follow. Even if that is the case, difficulty in understanding a statute does not give anyone the right to not follow it. If it did, for example, no one would ever have to pay taxes.

HARVLIE v JACK POST CORPORATION

Docket No. 276044. Submitted June 10, 2008, at Grand Rapids. Decided August 21, 2008, at 9:25 a.m. Leave to appeal sought.

A workers' compensation magistrate made an open award of wage-loss benefits and reasonable and necessary medical benefits to Richard E. Harvlie after Harvlie's left leg was burned in a work-related accident at Jack Post Corporation, whose workers' compensation insurer was St. Paul Fire and Marine Insurance Company. Blue Cross Blue Shield, Harvlie's medical insurer filed an application for mediation or hearing in the Workers' Compensation Agency, seeking reimbursement from Jack Post and St. Paul for the cost of Harvlie's medical care. Harvlie filed a similar application for reimbursement of medical expenses, but additionally sought costs and attorney fees incurred in seeking reimbursement and a penalty for failure to make payments as ordered by the magistrate. Following a hearing, a magistrate granted the reimbursement sought by Blue Cross Blue Shield and Harvlie and ordered Jack Post and St. Paul to pay Harvlie's attorney fees and a penalty for late payment of benefits. The Workers' Compensation Appellate Commission (WCAC) affirmed the magistrate's decision. The Court of Appeals, in an unpublished order entered August 31, 2006 (Docket No. 270678), denied leave to appeal. The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 477 Mich 1017 (2007).

The Court of Appeals *held*:

1. The WCAC correctly determined that MCL 418.315(1) authorized the magistrate to order Jack Post to pay Harvlie's attorney fees. MCL 418.315(1) requires an employer to furnish, or cause to be furnished, reasonable medical, surgical, hospital services, medicines, or other treatment to an employee who receives a personal injury arising out of and in the course of employment. The statute also authorizes a workers' compensation magistrate to order an employer who has failed, neglected, or refused to furnish treatment to reimburse the employee, or someone who has paid on the employee's behalf, the reasonable expense of treatment. Finally, the statute authorizes a magistrate to prorate attorney fees at the contingent fee rate paid by the employee.

2. Res judicata does not preclude Harvlie's claim for attorney fees. The award of attorney fees was based on Jack Post and St. Paul's failure to pay the benefits ordered after the first hearing. The issue of nonpayment of benefits could not have been raised at the first hearing.

3. Competent, material, and substantial evidence supported the magistrate's finding that the medical bills at issue would not have been paid but for the petition filed by Harvlie's attorney. The WCAC did not err in affirming that finding, and, in the absence of fraud and the presence of competent evidence, the Court of Appeals must affirm the WCAC.

Affirmed.

WORKERS' COMPENSATION — MAGISTRATES — ATTORNEY FEES — EMPLOYER'S REFUSAL TO PROVIDE TREATMENT TO INJURED EMPLOYEE.

A workers' compensation magistrate who finds that an employer has failed, neglected, or refused to furnish, or cause to be furnished, reasonable medical, surgical, hospital services, medicines, or other treatment to an employee who received a personal injury arising out of and in the course of employment has discretionary authority to award attorney fees to the employee (MCL 418.315[1]).

Smit & Kragt, P.C. (by *Timothy A. Kragt*), for Richard E. Harvlie.

Kluczynski, Girtz & Vogelzang (by *Duncan A. McMillan*) for Jack Post Corporation and St. Paul Fire and Marine Insurance Company.

Before: BANDSTRA, P.J., and TALBOT and SCHUETTE, JJ.

PER CURIAM. This matter returns to this Court on remand from our Supreme Court for consideration as on leave granted. 477 Mich 1017 (2007). Defendant employer and its insurer appeal a decision of the Workers' Compensation Appellate Commission (WCAC), which affirmed with modifications[1] an order of

[1] The WCAC modified the magistrate's order, in part, to reflect a nursing care service fee of $75 a visit to plaintiff's care providers. Defendants originally challenged the WCAC's modification on appeal. However, pursuant to a stipulation, this issue was dismissed by order of

the magistrate. The magistrate ordered (1) reimbursement for all reasonable expenses incurred by plaintiff's care providers from September through November 2003; (2) reimbursement for their mileage and attendant care; (3) reimbursement to Blue Cross Blue Shield (Blue Cross); (4) an attorney fee in an amount constituting 30 percent of the total of the medical bills ordered to be paid; and (5) a penalty for failing to pay the medical bills in a timely manner. We affirm.

I. FACTS

Plaintiff, Richard E. Harvlie, sustained a burn injury to his right leg while in the course of his employment as a welder for defendant employer, Jack Post Corporation. The magistrate granted plaintiff an open award of wage loss benefits and reasonable and necessary medical benefits. Thereafter, Blue Cross filed an application for mediation or hearing, seeking reimbursement for medical expenses paid in association with the treatment of plaintiff's injury. Plaintiff then filed an application for mediation or hearing, representing that since the magistrate granted the open award, defendant had "refused to pay for reasonable and necessary medical expenses." Plaintiff sought "all benefits afforded by the [Worker's Disability Compensation] Act, along with actual costs and attorney fees in securing these benefits" and the "imposition of the penalty provisions of the Act for failure to make payments in a timely matter [sic] as prescribed by Statute, and in violation of the Order of [the magistrate]."

Following trial on the merits of the petitions, the magistrate granted the reimbursement sought by both Blue Cross and plaintiff. The magistrate set the rate for

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this Court. *Harvlie v Jack Post Corp*, unpublished order of the Court of Appeals, entered March 27, 2008 (Docket No. 276044).

reimbursement to plaintiff's relatives for nursing care at $12.50 an hour. He based this rate on the earnings of plaintiff's sister-in-law at her regular work, which he found was approximately the same hourly rate as a certified nurse's assistant.

The magistrate also found that plaintiff's counsel was entitled to an attorney fee under MCL 418.315(1) with regard to the unpaid medical bills. The magistrate agreed with plaintiff's counsel that "the bills would not have been paid but for the fact that he filed a petition." Moreover, because the bills were not paid within 30 days of their receipt, the magistrate ordered defendants to pay a $1,500 penalty.

Defendants appealed to the WCAC, challenging the magistrate's award of attorney fees. The WCAC rejected each of defendants' challenges to the fee award. First, the WCAC determined that, when the last two sentences of § 315(1) are read together, "it becomes clear that the prorated attorney fee referred to should be paid by the employer/carrier and not the health care provider." The WCAC conceded that the authority to award an attorney fee against the employer or its insurance carrier would not automatically occur in all cases where there is an award of medical benefits; rather, the "plaintiff bears the burden of proving that the employer/carrier is in fact guilty of that breach, in order to have the magistrate award those attorney fees." The WCAC then opined that, in this case, where the medical bills were paid before the second trial but not before plaintiff went to the expense of hiring an attorney and filing an application, the magistrate did not abuse his authority in ordering defendant employer to pay plaintiff's attorney fees. The WCAC observed that "[i]t certainly does not appear that defendant was

routinely paying medical bills, until after plaintiff sought help from the workers' compensation agency."

Second, the WCAC rejected defendants' argument that the doctrine of res judicata barred any award of attorney fees for medical expenses incurred before the first trial because plaintiff could have sought, but did not seek, an attorney fee award for those expenses at the time of the first trial. The WCAC opined:

> What defendants fail to understand (or acknowledge) is, that it is not the compensability of the medical bills, but the ongoing failure, neglect or refusal to pay, which allows the magistrate the discretion to order the attorney fees. If plaintiff were seeking an attorney fee for medical benefits which had not been timely paid before the first trial, but had been promptly paid upon the magistrate's order, res judicata would be a bar to such an award. Here, defendants are ordered to pay an attorney fee as a result of their failure to pay medical bills, which were ordered after the first trial.

Third, the WCAC rejected defendants' assertion that the magistrate miscalculated the amount on which he assessed an attorney fee by including some of the bills paid by Blue Cross. After reviewing plaintiff's exhibits "in detail," the WCAC concluded that "[w]hile it is remotely possible that these are the same charges, defendants have simply not persuaded us that that is the case."

Fourth, the WCAC rejected defendants' assertion that there was no sound public policy reason for awarding an attorney fee, even for unpaid medical benefits, when a claimant's attorney has adequate motivation to pursue a claim on behalf of the claimant. The WCAC agreed with plaintiff that defendants overlooked one of the underlying purposes of the attorney fee provision, which is "to deter employers from breaching their statutory duty to provide medical treatment to injured

workers." The WCAC added, "Immunizing employers from liability for attorney fees whenever the claimant or a third-party payer can afford to hire an attorney would hardly give employers an incentive to pay legitimate bills in a timely manner." The WCAC opined that the magistrate did not abuse his discretion when he awarded attorney fees in this case because a rational basis for the award existed in the record: "Here there is ample evidence that the employer had notice of outstanding medical bills, but did not pay them until after plaintiff sought relief from the Workers' Compensation Agency."

Defendants now appeal.

II. STANDARD OF REVIEW

Our review of the WCAC's decision is solely limited to ensuring the integrity of the administrative process. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000). "As long as there exists in the record any evidence supporting the WCAC's decision, and as long as the WCAC did not misapprehend its administrative appellate role (e.g., engage in de novo review; apply the wrong rule of law), then the judiciary must treat the WCAC's factual decisions as conclusive." *Id*. at 703-704. This Court continues to exercise de novo review of questions of law involved in any final order of the WCAC. *Id*. at 697 n 3.

III. ANALYSIS

A. ATTORNEY FEES

The WCAC correctly determined that MCL 418.315(1) authorized the magistrate to order defendant employer to pay plaintiff's attorney fees. MCL

418.315(1) contains, in part, three pivotal sentences as follows:

> [1] The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. . . .
>
> [2] If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate.
>
> [3] The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.

Here, the WCAC majority's construction of § 315(1) is consistent with a harmonious reading of the last two sentences of § 315(1). The third sentence of § 315(1) provides that "[t]he worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee." Standing alone, this sentence contains ambiguity because it fails to identify whom the magistrate may order to pay the attorney fees. This sentence is not to be construed in isolation, however, but instead must be read in the context of the whole statute and harmonized with the statute's other provisions in a manner that effectuates the purpose intended by the Legislature. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159-160; 627 NW2d 247 (2001); *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 52; 731 NW2d 94 (2006). The second sentence of § 315(1) addresses the consequences of an employer's failure to pay medical expenses and authorizes a magistrate to order the employer to reimburse either the injured claimant or the claimant's medical insurance provider for the

reasonable medical expenses incurred. This second sentence addresses the consequences to a nonpaying employer that "fails, neglects, or refuses" to provide reasonable medical services. The WCAC properly construed the final two sentences of § 315(1) and provided a unity of purpose for this statute.

Further, the construction given § 315(1) by the WCAC is consistent with the construction given the provision by several panels of this Court, albeit in obiter dicta. See, e.g., *Duran v Sollitt Constr Co*, 135 Mich App 610, 615; 354 NW2d 277 (1984); *Zeeland Community Hosp v Vander Wal*, 134 Mich App 815, 824-825; 351 NW2d 853 (1984).

Accordingly, the WCAC's construction of § 315(1) is not "clearly wrong," *Tyler v Livonia Pub Schools*, 459 Mich 382, 388; 590 NW2d 560 (1999), and is entitled to "respectful consideration" by this Court, *In Re Rovas Complaint Against SBC Michigan*, 482 Mich 90, 93-94, 107-108, 117-118; 754 NW2d 259 (2008). The WCAC did not misapply the law when it affirmed the magistrate's exercise of his discretionary authority to order defendant employer to pay plaintiff an attorney fee.

Section 315(1) authorized the magistrate to award plaintiff attorney fees to be paid by his former employer. Accordingly, this Court lacks the authority to independently assess whether the award of attorney fees in this case reflects the best public policy. The relief defendants seek must be supplied by the Legislature. *Lash v Traverse City*, 479 Mich 180, 197; 735 NW2d 628 (2007).

B. RES JUDICATA

The WCAC also correctly refused to apply the doctrine of res judicata as a bar to an award of attorney fees. As a general proposition, the doctrine of res judicata applies to workers' compensation awards. See

Gose v Monroe Auto Equip Co, 409 Mich 147, 159; 294 NW2d 165 (1980); *Banks v LAB Lansing Body Assembly*, 271 Mich App 227, 229; 720 NW2d 756 (2006). In this specific case, however, the doctrine does not bar plaintiff's claim for attorney fees. Although the compensability of the medical bills may have been an issue that arose before the first trial, the premise for the magistrate's discretionary decision under § 315(1) was defendants' failure to pay plaintiff's medical benefits, which occurred *after* the first trial. Accordingly, the issue of nonpayment could not have been raised at the first trial. *Paige v Sterling Hts*, 476 Mich 495, 521 n 46; 720 NW2d 219 (2006). Under these circumstances, res judicata is not implicated. The WCAC committed no error in its legal analysis requiring reversal.

C. FACTUAL DETERMINATIONS

Finally, the WCAC reasonably inferred from defendants' refusal to make the payments until plaintiff filed a petition that plaintiff's efforts "broke the medical payments loose."

The magistrate determined that plaintiff's counsel was entitled to an attorney fee because the medical bills in question would not have been paid "but for" the petition filed by plaintiff's attorney. The WCAC was required to consider this finding of fact conclusive if it was supported by competent, material, and substantial evidence on the entire record. MCL 418.861a(3); *Mudel*, *supra* at 698-699. The WCAC agreed with the magistrate's finding of fact, observing that "[i]t certainly does not appear that [defendants were] routinely paying medical bills, until after plaintiff sought help from the workers' compensation agency." In the absence of fraud, this Court must treat findings of fact made by the WCAC acting within its powers as conclusive if there is

"any competent evidence" to support them. *Mudel*, *supra* at 700-701; see also MCL 418.861a(14).

The fact that defendants paid the medical bills at issue after plaintiff hired an attorney and filed an application for hearing allows a reasonable inference that defendants would not have paid the disputed bills but for the application filed by plaintiff's attorney. The WCAC's finding is supported under the "any competent evidence" standard. It is, therefore, conclusive. The WCAC did not misapprehend or misapply its standard for reviewing the magistrate's finding of fact.

Affirmed.

SHEPHERD MONTESSORI CENTER MILAN
v ANN ARBOR CHARTER TOWNSHIP (ON REMAND)

Docket No. 272357. Submitted May 16, 2008, at Lansing. Decided August 26, 2008, at 9:00 a.m. Leave to appeal sought.

Shepherd Montessori Center Milan brought an action in the Washtenaw Circuit Court against Ann Arbor Charter Township, a township zoning official, and the township's zoning board of appeals after it was denied a variance to operate a Catholic Montessori school on leased property. The court, Melinda Morris, J., granted the defendants' summary-disposition motion and denied the plaintiff's summary-disposition motion. The Court of Appeals, OWENS and SCHUETTE, JJ. (MURPHY, P.J., concurring in the result only), affirmed in part and reversed in part. With regard to the matters reversed, the Court of Appeals determined that the plaintiff had satisfied one of the jurisdictional requirements to bring an action under 42 USC 2000cc of the Religious Land Use and Institutionalized Persons Act (RLUIPA) and that the plaintiff's use of the property for religious education was a religious exercise protected under RLUIPA. The Court of Appeals remanded the case for the trial court to determine whether the defendants' denial of a variance placed a substantial burden on the plaintiff's religious exercise. The Court of Appeals instructed the parties and the trial court to consider various factors in analyzing the RLUIPA claim, including the actual availability of alternative property, the availability of property suitable for a primary school, and the economic burdens of alternative locations. The Court of Appeals also reversed with regard to the plaintiff's equal-protection claim. 259 Mich App 315 (2003) (*Shepherd I*). On remand, the trial court again granted the defendants' summary-disposition motion and again concluded that the plaintiffs had failed to establish a genuine issue of material fact concerning its equal-protection claim. The plaintiff appealed. The Court of Appeals, SAAD, P.J., and HOEKSTRA and SMOLENSKI, JJ., reversed and remanded for the entry of a judgment in favor of the plaintiff. 275 Mich App 597 (2007) (*Shepherd II*). The Court of Appeals held that the trial court failed to correctly apply the "substantial burden" factors as set forth in *Shepherd I*, that the defendants' denial of the zoning variance imposed a substantial burden on the plaintiff's religious exercise

contrary to RLUIPA and, because the defendants provided no evidence of a compelling governmental interest, the plaintiff was entitled to summary disposition in its favor on the RLUIPA claim. The Court of Appeals also held that the plaintiff was entitled to summary disposition on the equal-protection claim, because the defendants conceded that the plaintiff, a religious entity, and the secular entity that had operated its day-care program on the property where the plaintiff wished to operate its school were similarly situated and had been treated differently and because the defendants failed to present evidence that the denial of the variance request was narrowly tailored to achieve a compelling governmental interest. The Supreme Court, in lieu of granting leave to appeal, vacated the *Shepherd II* opinion and remanded the case to the Court of Appeals for reconsideration in light of *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373 (2007), specifically instructing the Court of Appeals to reconsider whether the denial of the zoning variance imposed a "substantial burden" on the plaintiff's religious exercise, i.e., whether the denial coerced individuals into acting contrary to their religious beliefs. 480 Mich 1143 (2008).

On remand, the Court of Appeals *held*:

1. As set forth in *Greater Bible Way*, to establish a RLUIPA violation, the plaintiff must show that the denial of the variance request coerces individuals into acting contrary to their religious beliefs. The plaintiff did not make such a showing or show that the property at issue has religious significance or that the plaintiff's faith requires a school at that particular site. The trial court correctly granted summary disposition in favor of the defendants on the RLUIPA claims.

2. The remand order of the Supreme Court did not alter the prior holding of the Court of Appeals in *Shepherd II* that the plaintiff was entitled to summary disposition on the equal-protection claim. The holding of *Shepherd II* must be reaffirmed. In light of the defendants' violation of the plaintiff's right to equal protection, the decision of the zoning board of appeals was contrary to law and the trial court erred in affirming that decision. The matter must be remanded to the trial court for entry of a judgment in favor of the plaintiff and to reverse the denial of the variance request by the zoning board of appeals.

Affirmed in part, reversed in part, and remanded.

Robert L. Bunting and *Robert Charles Davis* for the plaintiff.

Bodman LLP (by *James J. Walsh*, *G. Christopher Bernard*, and *Sandra L. Sorini*) for the defendants.

ON REMAND

Before: SAAD, C.J., and HOEKSTRA and SMOLENSKI, JJ.

SAAD, C.J. This case is on remand from our Supreme Court. In *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315; 675 NW2d 271 (2003) (*Shepherd I*), this Court reversed the trial court's grant of summary disposition to defendants on plaintiff's claims that defendants' denial of a variance for plaintiff to use property adjacent to its Catholic Montessori day care center to operate a faith-based school violated 42 USC 2000cc of the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the Equal Protection Clause of the United States Constitution, US Const, Am XIV, § 1, and the Michigan Constitution, Const 1963, art 1, § 2. *Id*. at 318-319. This Court remanded the case for consideration of whether defendants' denial of the variance imposed a "substantial burden" on plaintiff's religious exercise and to consider various aspects of feasibility and economic hardship associated with alternative sites for the school. *Id*. at 329-333. On remand, the trial court again granted summary disposition in defendants' favor.

In the second appeal, *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 275 Mich App 597; 739 NW2d 664 (2007) (*Shepherd II*), we ruled that the trial court failed to correctly apply the "substantial burden" factors as set forth in *Shepherd I*, that defendants' denial of the zoning variance imposed a substantial burden on plaintiff's religious exercise contrary to RLUIPA and, because defendants provided no evidence of a compelling governmental in-

terest, plaintiff was entitled to summary disposition on its RLUIPA claim. *Id*. at 609-610. On plaintiff's equal protection claim, we ruled that defendants treated Rainbow Rascals, a secular entity, more favorably than plaintiff, a religious entity. *Id*. at 613-614. Defendants conceded that plaintiff and Rainbow Rascals are similarly situated, and defendants offered no reason to justify its refusal to permit plaintiff to operate its faith-based school in the same space that Rainbow Rascals had operated its day care program. *Id*. For these reasons, and because defendants offered no evidence to show that their denial of plaintiff's variance request was narrowly tailored to achieve a compelling governmental interest, we held that plaintiff is entitled to summary disposition on its equal protection claim. *Id*.

In lieu of granting defendants' application for leave to appeal, the Supreme Court vacated our ruling in *Shepherd II*, and remanded the case for reconsideration in light of *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373; 733 NW2d 734 (2007), which was decided approximately one month after we decided *Shepherd II*. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 480 Mich 1143 (2008). Specifically, the Supreme Court instructed us to "reconsider whether the denial of the zoning variance imposed a 'substantial burden' on the plaintiff's religious exercise, i.e., whether the denial of the variance 'coerce[s] individuals into acting contrary to their religious beliefs.' " *Id*., quoting *Greater Bible Way,* 478 Mich at 401.

In *Greater Bible Way*, the plaintiff church alleged violations under RLUIPA after the city of Jackson denied its request to rezone its property from single-family residential to multiple-family residential. *Greater Bible Way, supra*, 478 Mich at 377-378. The

plaintiff wanted to build an apartment complex across the street from its church. *Id*. at 377. After a bench trial, the court found that the defendants had violated RUILPA and this Court agreed. *Id*. at 378. Our Supreme Court reversed and held that RLUIPA does not apply because a "refusal to rezone the property did not constitute an 'individualized assessment' " under RLUIPA. *Id*. at 391. Although that ruling was dispositive, the Court proceeded to consider whether any violation of RLUIPA had occurred, "[a]ssuming" that RLUIPA applied. *Id*. at 391. The Court addressed whether the city's refusal to rezone the property constituted a "substantial burden" on the plaintiff's religious exercise:

> [W]e believe that it is clear that a "substantial burden" on one's "religious exercise" exists where there is governmental action that coerces one into acting contrary to one's religious beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires. That is, a "substantial burden" exists when one is forced to choose between violating a law (or forfeiting an important benefit) and violating one's religious tenets. A mere inconvenience or irritation does not constitute a "*substantial* burden." Similarly, something that simply makes it more difficult in some respect to practice one's religion does not constitute a "*substantial* burden." Rather, a "substantial burden" is something that "coerce[s] individuals into acting contrary to their religious beliefs[.]" [*Id*. at 400-401, quoting *Lyng v Northwest Indian Cemetery Protective Ass'n,* 485 US 439, 450; 108 S Ct 1319; 99 L Ed 2d 534 (1988) (emphasis added).]

The Court ruled that Greater Bible Way Temple failed to establish a substantial burden on its religious exercise:

> The city is not forbidding plaintiff from building an apartment complex; it is simply regulating where that apartment complex can be built. If plaintiff wants to build

> an apartment complex, it can do so; it just has to build it on property that is zoned for apartment complexes. If plaintiff wants to use the property for housing, then it can build single-family residences on the property. In other words, in the realm of building apartments, plaintiff has to follow the law like everyone else.
>
> While [the zoning ordinance] may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, it does not prohibit plaintiff from providing housing. Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The city has not done anything to coerce plaintiff into acting contrary to its religious beliefs, and, thus, it has not substantially burdened plaintiff's exercise of religion. [*Greater Bible Way, supra,* 478 Mich at 401-402 (quotation marks and citations omitted).]

The Court reversed and remanded for entry of judgment in favor of the defendants.

In light of the Supreme Court's interpretation of RLUIPA, we are compelled to reach a similar result. As set forth in *Greater Bible Way, supra*, 478 Mich at 400, to establish a RLUIPA violation, plaintiff must show that the denial of the variance request "coerces" individuals into acting contrary to their religious beliefs. Plaintiff did not show that the denial of the variance forces plaintiff to do something that its religion prohibits, or refrain from doing something that its religion requires. Plaintiff did not allege that the property at issue has religious significance or that plaintiff's faith requires a school at that particular site. *Shepherd I, supra*, 259 Mich App at 332. Rather, the evidence suggests that, notwithstanding substantial evidence of prohibitive cost and a lack of available, suitable space, plaintiff *could* operate its school at another location in the surrounding area, and plaintiff conducted a real estate search toward that end. In other words, plaintiff

may operate a faith-based school, but it must do so on property that is zoned for schools. *Greater Bible Way, supra,* 478 Mich at 401-402. Under the Supreme Court's reasoning, the denial of the variance does not constitute a substantial burden on plaintiff's religious exercise and, therefore, the trial court correctly granted summary disposition to defendants on the RLUIPA claims.

With regard to plaintiff's equal protection claim, the Supreme Court's remand order does not alter our prior holding that plaintiff is entitled to summary disposition. The Supreme Court instructed us to reconsider our judgment in light of *Greater Bible Way*, which did not involve an equal protection claim and, therefore, the legal analysis in that case does not affect our holding. Defendants conceded that plaintiff and Rainbow Rascals were similarly situated, and defendants failed to offer a reason for refusing to permit plaintiff to operate its school in the same space that Rainbow Rascals had operated its day care program. *Shepherd II, supra*, 275 Mich App at 613-614. Further, defendants offered no evidence to show that their denial of plaintiff's variance request was narrowly tailored to achieve a compelling governmental interest. *Id*. at 614. As we explained in *Shepherd II*:

> Evidence established that defendants denied plaintiff a variance to operate an educational program in the same space formerly occupied by the similarly situated Rainbow Rascals, notwithstanding that there would be far fewer children in the school and that it would cause fewer traffic and density problems. Indeed, as clarified at oral argument on appeal, after several years of litigation it is unrebutted that defendants have not offered a reason to plaintiff why it was denied the opportunity to operate its school in the identical space that Rainbow Rascals operated its daycare program. Thus, we hold that defendants have treated a

> secular entity more favorably than plaintiff, a religious entity. The burden then shifted to defendants to show that their denial of plaintiff's variance was precisely tailored to achieve a compelling governmental interest, *Shepherd I, supra* at 334, and defendants offered no evidence or argument on this point. Accordingly, the trial court erred when it failed to grant summary disposition to plaintiff. [*Id*. at 613-614.]

Accordingly, though the Supreme Court's holding in *Greater Bible Way* compels us to affirm the trial court's grant of summary disposition to defendants on plaintiff's RLUIPA claim, we reaffirm our holding that the application of the zoning ordinance violated the equal protection guarantee of the United States Constitution. In light of this violation, the decision of the Ann Arbor Charter Township Zoning Board of Appeals "was contrary to law and the trial court erred when it affirmed the [zoning board of appeals] denial of plaintiff's request for a variance." *Shepherd II, supra*, 275 Mich App at 614. Again, therefore, "[w]e remand this case to the trial court to enter judgment in favor of plaintiff and to reverse the [zoning board of appeals] denial of plaintiff's variance request." *Id*. We retain jurisdiction.

TOAZ v DEPARTMENT OF TREASURY

Docket No. 275784. Submitted May 6, 2008, at Detroit. Decided July 1, 2008. Approved for publication August 26, 2008, at 9:05 a.m.

April D. Toaz filed a petition in the Tax Tribunal challenging an income-tax assessment by the Michigan Department of Treasury for tax year 2001. Before filing the petition, the petitioner had acknowledged that she failed to report income from gambling and the respondent had determined that the petitioner had an undisputed partial tax liability of $1,515.36 for the acknowledged gambling income. After the petitioner failed to pay the full amount of the undisputed tax, the respondent moved for summary disposition, claiming that the Tax Tribunal lacked subject-matter jurisdiction because the petitioner failed to pay in full the undisputed tax liability, as required by MCL 205.22. The Tax Tribunal granted the motion. The petitioner appealed.

The Court of Appeals *held*:

At the time pertinent to this case, MCL 205.22(1) provided, in part: "A taxpayer aggrieved by an assessment . . . of the [Department of Treasury] may appeal the contested portion of the assessment . . . to the tax tribunal within 35 days . . . after the assessment . . . . The uncontested portion of an assessment . . . shall be paid as a prerequisite to appeal . . . ." The statutory phrase "uncontested portion of an assessment . . . shall be paid as a prerequisite to appeal" is susceptible to only one reasonable interpretation. An aggrieved taxpayer must actually discharge the uncontested tax debt, by full payment, before appealing the contested portion of the tax assessment. The aggrieved taxpayer must pay the uncontested debt and file the written petition required in MCL 205.735 within 35 days to invoke the Tax Tribunal's jurisdiction.

Affirmed.

TAXATION — DEPARTMENT OF TREASURY — TAX ASSESSMENTS — APPEAL — TAX TRIBUNAL — PAYMENT OF UNCONTESTED PORTION.

A taxpayer who is aggrieved by a tax assessment from the Department of Treasury but who does not contest a portion of the assessment must pay the uncontested partial tax liability in full

before the taxpayer can invoke the jurisdiction of the Tax Tribunal to hear an appeal of the contested portion of the assessment (MCL 205.22[1], 205.735).

Michigan State University College of Law Tax Clinic (by *Andrew S. Campbell*) for the petitioner.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Bradley K. Morton*, Assistant Attorney General, for the respondent.

Before: OWENS, P.J., and METER and SCHUETTE, JJ.

PER CURIAM. In this income tax dispute, petitioner appeals as of right from the Tax Tribunal's order granting summary disposition in favor of respondent. The Tax Tribunal determined that it lacked jurisdiction to consider petitioner's tax assessment challenge because she failed to pay the uncontested portion of the assessment as required by MCL 205.22. We affirm.

I. FACTS

On March 14, 2006, respondent issued a final assessment of $13,536 to petitioner for income tax owed for tax year 2001. Subsequent penalty and interest charges increased the amount due to $17,881.60. Petitioner disputed that amount. However, petitioner acknowledged that she failed to report $36,080 of gambling income on her 2001 federal income tax return, which affected her Michigan income tax liability. On the basis of the admitted figure for gambling income, the respondent determined the undisputed portion of tax that petitioner was required to pay was $1,515.36.

Petitioner claimed that she was unable to pay the entire uncontested amount. Instead, she paid $500 towards the tax liability when she filed her petition for review of the final assessment with the Tax Tribunal.

Petitioner then proposed to make five installment payments to pay the uncontested amount by January 20, 2007. Respondent moved for summary disposition under MCR 2.116(C)(4), arguing that the Tax Tribunal lacked jurisdiction over the matter because petitioner failed to pay the undisputed portion of the tax under MCL 205.22. The Tax Tribunal agreed with respondent and entered an order granting summary disposition in respondent's favor. Petitioner now appeals.

II. STANDARD OF REVIEW

"This Court's review of Tax Tribunal decisions in nonproperty tax cases is limited to determining whether the decision is authorized by law and whether any factual findings are supported by competent, material, and substantial evidence on the whole record." *J C Penney Co, Inc v Dep't of Treasury*, 171 Mich App 30, 37; 429 NW2d 631 (1988); see also Const 1963, art 6, § 28. Issues involving the interpretation and application of statutes are reviewed de novo as questions of law. *Danse Corp v City of Madison Hts*, 466 Mich 175, 178; 644 NW2d 721 (2002).

In reviewing a motion under MCR 2.116(C)(4), it is proper to consider the pleadings and any affidavits or other documentary evidence submitted by the parties to determine if there is a genuine issue of material fact. *Cork v Applebee's of Michigan, Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000); see also MCR 2.116(G)(5). Jurisdictional questions are reviewed de novo, but this Court " 'must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate . . . [a lack of] subject matter jurisdiction.' " *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 356; 733 NW2d 107 (2007), quoting *CC Mid West, Inc v McDougall*, 470 Mich 878 (2004) (alteration by the *L & L* Court).

III. ANALYSIS

At the time pertinent to the proceedings in this case, MCL 205.22 provided, in relevant part:[1]

> (1) A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days, or to the court of claims within 90 days after the assessment, decision, or order. *The uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal*. . . .
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> (2) An appeal under this section shall be perfected as provided under the tax tribunal act, Act No. 186 of the Public Acts of 1973, as amended, being sections 205.701 to 205.779 of the Michigan Compiled Laws, and rules promulgated under that act for the tax tribunal, or chapter 64 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, as amended, being sections 600.6401 to 600.6475 of the Michigan Compiled Laws, and rules adopted under that chapter for the court of claims. In an appeal to the court of claims, the appellant shall first pay the tax, including any applicable penalties and interest, under protest and claim a refund as part of the appeal.
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> * * *
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> (4) The assessment, decision, or order of the department, if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack. [Emphasis added.]

Section 35 of the Tax Tribunal Act, MCL 205.735, addresses the manner for perfecting an appeal. At the

[1] MCL 205.22 was amended by 2007 PA 194, effective December 21, 2007. Although the amendment does not apply to this case, we note that there were no substantive changes to the provisions applicable to this case.

time petitioner's petition was filed in April 2006, the statute provided, in relevant part:[2]

> In all other matters, the jurisdiction of the tribunal is invoked by a party in interest, as petitioner, filing a written petition within 30 days after the final decision, ruling, determination, or order that the petitioner seeks to review, or within 35 days if the appeal is pursuant to section 22(1) of 1941 PA 122, MCL 205.22. [MCL 205.735(2).]

"The primary rule governing the interpretation of a statute is to discern and give effect to the Legislature's intent through reasonable construction in consideration of the purpose of the statute and the object sought to be accomplished." *Tyson Foods, Inc v Dep't of Treasury*, 276 Mich App 678, 684; 741 NW2d 579 (2007). In construing legislative intent, a court begins by examining the statutory language and, if the statutory language is clear, it must be enforced as plainly written. *Id.*

The statutory language in this case is not ambiguous. MCL 205.22(1) clearly requires that "[t]he uncontested portion of an assessment . . . shall be paid as a prerequisite to appeal." Although the words "shall," "prerequisite," and "paid" are not defined, undefined statutory words and phrases are construed according to their common and approved usage, unless such a construction would be inconsistent with the Legislature's manifest intent. *ADVO-Systems, Inc v Dep't of Treasury*, 186 Mich App 419, 424; 465 NW2d 349 (1990). The word "prerequisite" is defined as "required beforehand" and "something prerequisite; precondition." *Random*

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[2] MCL 205.735 was amended by 2006 PA 174, effective May 30, 2006. As now set forth in subsection 3, the amended statute provides, in part:

> In all other matters, the jurisdiction of the tribunal is invoked by a party in interest, as petitioner, filing a written petition within 35 days after the final decision, ruling, determination, or order that the petitioner seeks to review.

House Webster's College Dictionary (1997), p 1029. Among the definitions of the word "pay" is "to discharge or settle (a debt, obligation, etc.), as by transferring money or goods, or by doing something" and "to discharge a debt or obligation." *Id.* at 957. The word "shall" generally indicates mandatory conduct. *Costa v Community Emergency Med Services, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006).

We must also consider the contextual setting of the words and phrases in the statute. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Examined in context, the statutory phrase "uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal" is susceptible to only one reasonable interpretation. An aggrieved taxpayer must actually discharge the uncontested tax debt, by full payment, before appealing the contested portion of the tax assessment. The aggrieved taxpayer must pay the uncontested debt and file the written petition required in MCL 205.735 within 35 days to invoke the Tax Tribunal's jurisdiction. A partial payment does not satisfy the statute, even when coupled with an allegation in the petition that the taxpayer lacks the financial resources to pay the full debt. Nor is a promise to pay the uncontested balance after the expiration of the 35 days sufficient to satisfy the statute. The Tax Tribunal does not have authority to grant a delayed appeal. *Curis Big Boy v Dep't of Treasury*, 206 Mich App 139, 142; 520 NW2d 369 (1994).

Additionally, because MCL 205.22 is not ambiguous, we may not apply an "absurd results" rule in contravention of the clear terms of the statute. *Cairns v East Lansing*, 275 Mich App 102, 118; 738 NW2d 246 (2007). "It is not within the authority of the judiciary 'to redetermine the Legislature's choice or to indepen-

dently assess what would be most fair or just or best public policy.' " *Lash v Traverse City*, 479 Mich 180, 197; 735 NW2d 628 (2007), quoting *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 504; 638 NW2d 396 (2002).

Petitioner also argues that MCL 205.22 is unconstitutional because it deprives her of due process by not affording her an opportunity to invoke the Tax Tribunal's jurisdiction without paying the entire uncontested portion of the tax assessment. However, petitioner did not raise this issue before the Tax Tribunal; therefore, it is not properly preserved and we need not address it. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003).

Affirmed.

PEOPLE v DAVENPORT

Docket No. 271366. Submitted March 4, 2008, at Lansing. Decided August 28, 2008, at 9:00 a.m. Leave to appeal sought.

Gary E. Davenport was convicted by a jury in the Presque Isle Circuit Court of six counts of first-degree criminal sexual conduct. He appealed, claiming ineffective assistance by trial counsel, Janet Frederick-Wilson, who had failed to raise an objection at trial concerning the potential conflict of interest created when the attorney who had represented the defendant at his preliminary examination, Richard Steiger, joined the Presque Isle County prosecutor's office before the defendant's trial concluded. The Court of Appeals granted the defendant's motion for a remand for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to create a factual record regarding the claim of ineffective assistance of counsel. After the hearing, the trial court, Scott L. Pavlich, J., ruled that Frederick-Wilson's performance fell below an objective standard of reasonableness, but that the defendant failed to establish that Frederick-Wilson's error was outcome-determinative. Accordingly, the trial court denied the defendant's motion for a new trial.

The Court of Appeals *held*:

1. Frederick-Wilson committed a serious and inexcusable error when she failed to challenge the potential conflict of interest that arose from Steiger's move to the prosecutor's office. MRPC 1.9 prohibits an attorney from "switching sides" by representing a new client in a matter if the attorney's former client has an interest adverse to the new client. MRPC 1.10 imposes limitations on an attorney's new firm with respect to representing parties whose interests are adverse to the new attorney's former clients. It requires the new firm to undertake and disclose safeguards against improper communications. Finally, MRPC 1.11(c) prohibits a lawyer serving as a public officer or employee from participating in a matter in which the lawyer participated personally and substantially when in private practice or nongovernmental employment.

2. Although the trial court correctly determined that the defendant failed to show a reasonable probability that, absent Frederick-Wilson's error, the result of the trial would have been

different, the trial court nevertheless committed plain error by failing to explore the potential conflict of interest and determine whether disqualification of the prosecutor's office was warranted.

3. Once a defendant has shown that a member of the prosecutor's office had counseled or represented the defendant in the same or related case, a presumption arises that members of the prosecutor's office have conferred about the matter. To rebut the presumption of shared confidences, the prosecutor must show that effective screening procedures have been used to isolate the defendant's former counsel from the prosecution of the substantially related criminal charges.

4. This case must be remanded for an evidentiary hearing on the question whether the prosecutor's office undertook sufficient safeguards to prevent Donald McLennan, the only other attorney in the prosecutor's office, from receiving any communications from Steiger concerning the defendant's case. The trial court's inquiry must be thorough and in-depth, and take into consideration the prosecutor's failure to come forward with the potential conflict of interest voluntarily and the office's ability to effectively quarantine the conflict of interest. Unless the trial court finds sufficient evidence of adequate safeguards, the defendant's conviction must be reversed and a new trial must be ordered.

Remanded.

CRIMINAL LAW — PROSECUTORS — PRIOR REPRESENTATION OF DEFENDANT IN SAME CASE — CONFLICT OF INTEREST.

If a lawyer who has represented a defendant in a criminal prosecution joins the prosecutor's office while the criminal prosecution remains pending, the entire prosecutor's office will be presumed to be privy to the confidences obtained by the former defense lawyer; to rebut the presumption of shared confidences, the prosecutor must show that effective screening procedures have been used to isolate the defendant's former counsel from the prosecution of the case; the screening procedures should take into account the size of the office, the structural organization of the office, the likelihood of contact between the attorney with the conflict of interest and the personnel involved in the ongoing prosecution, and the existence of rules that prevent the attorney with the conflict of interest from accessing files or information pertaining to the case (MRPC 1.9, 1.10, 1.11[c]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Mark G. Sands*, Assistant Attorney General, for the people.

Kirsch & Satawa, P.C. (by *Mark A. Satawa*, *Stuart G. Friedman*, and *Lisa B. Kirsch Satawa*), for the defendant.

Before: SAAD, C.J., and MURPHY and DONOFRIO, JJ.

SAAD, C.J. A jury convicted defendant of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age), and four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(iv) (victim aged 13 to 15 while defendant was a teacher at the victim's school). He appeals his convictions and sentences. For the reasons set forth below, we remand this matter to the trial court for an evidentiary hearing.

I. FACTS AND PROCEEDINGS

Evidence showed that while defendant taught at Seventh-Day Adventist School in Onaway, he sexually molested a student, TJ, over a three-year period. Attorney Richard Steiger represented defendant at his preliminary examination. Before trial, Steiger accepted employment in the Presque Isle County prosecutor's office. The prosecutor's office employed only two prosecutors, Steiger, and Donald McLennan, who represented the people at trial. Defendant's trial counsel, Janet Frederick-Wilson, failed to raise an objection to the potential conflict of interest and neither Steiger nor McLennan raised it in the trial court.

On appeal, defendant asserts a claim of ineffective assistance of counsel. Defendant argues, among other claims, that Frederick-Wilson was ineffective for failing to move for disqualification of the prosecutor's office on the ground of conflict of interest.[1] This Court granted defen-

[1] Defendant raised several other claims of ineffective assistance of counsel which, in light of our holding, need not be fully addressed at this time.

dant's motion for a *Ginther*[2] hearing to create a factual record regarding his claim of ineffective assistance.

At the *Ginther* hearing, Frederick-Wilson testified that she knew that the preliminary examination transcript listed Richard Steiger as defendant's attorney. She said she never spoke to Steiger, did not know Steiger, and did not know that Steiger ended his representation of defendant because he joined the prosecutor's office. Frederick-Wilson said she never looked into any conflict with the prosecutor's office because she "didn't know any conflict existed."

Defendant testified that, on two occasions, he told Frederick-Wilson that he did not know how he would get a fair trial because his former attorney was now working for the prosecutor's office. Dean Tong, a forensic trial consultant who assisted Frederick-Wilson with trial preparation, testified that he discussed Steiger's move to the prosecutor's office with Frederick-Wilson and his concerns about the conflict of interest that created. James Samuels, an expert on the standard of care for legal practice, testified that there was no way that a small prosecutor's office could have adequately screened McLennan from exposure to any information Steiger might have about the case. Samuels further opined that the prosecutor's office should have referred the case to the Attorney General and that fundamental fairness should have compelled defense counsel to file a motion to disqualify the prosecutor's office. No one from the Presque Isle County prosecutor's office testified at the *Ginther* hearing.

The trial court ruled that defendant established the first part of his claim of ineffective assistance by demonstrating that, for numerous reasons, Frederick-

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Wilson's performance fell below an objective standard of reasonableness. Yet, the court also ruled that defendant failed to establish that the error was outcome-determinative. The court observed that Steiger's move to a two-attorney prosecutor's office raised "a red flag which merited an inquiry which did not occur," but held that defendant failed to establish the second aspect of the test for ineffective counsel by failing to present evidence that Steiger actually shared information with McLennan. The trial court found "overwhelming" evidence that defendant had "an inappropriate interest" in the complainant, and denied defendant's motion for a new trial.

II. ANALYSIS

Generally, "[i]n order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different" and the result that did occur was fundamentally unfair or unreliable. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001); see also *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Here, we agree with the trial court that defense counsel committed a serious and inexcusable error when she failed to challenge the potential conflict of interest that arose from Steiger's move to the prosecutor's office. MRPC 1.9 prohibits an attorney from "switching sides" by representing a new client in a matter if the attorney's former client has an interest adverse to the new client. The rule provides as follows:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the

> same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
>
> (b) Unless the former client consents after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated has previously represented a client
>
> (1) whose interests are materially adverse to that person, and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

MRPC 1.10 governs the limitations imposed on an attorney's new firm with respect to representing parties whose interests are adverse to the new attorney's former clients. It also requires the new firm to undertake and disclose safeguards against improper communications. It provides, in pertinent part, as follows:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a) or (c), or 2.2.
>
> (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or

> substantially related matter in which that lawyer, or a firm with which the lawyer was associated, is disqualified under Rule 1.9(b), unless:
>
> (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

Further, MRPC 1.11(c) states:

> Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
>
> (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter . . . .

In addition to the aforementioned sections of the Michigan Rules of Professional Conduct, Michigan caselaw also provides guidance on how trial courts should deal with these conflicts. The trial court should be promptly informed of a defense attorney's move to the prosecutor's office, and it should inquire into the matter and order an appropriate safeguard, such as disqualifying the individual attorney affected by the conflict of interest, or the entire prosecutor's office, if necessary. See *In re Osborne*, 459 Mich 360, 368; 589 NW2d 763 (1999); see also *People v Doyle*, 159 Mich App 632, 644-645; 406 NW2d 893 (1987).

We affirm the trial court's ruling that defense counsel's failure to raise this matter constitutes an objectively unreasonable error. Clearly, a potential conflict of interest arose when Steiger joined the prosecutor's office after representing defendant at the preliminary examination. Defense counsel was obligated to protect

her client from the potential prejudice inherent in these circumstances. Had she raised a timely objection, the trial court would have been obligated to make an inquiry and fashion an appropriate safeguard.

We also agree with the trial court that defendant failed to show a reasonable probability that, absent defense counsel's error, the result of his trial would be different. However, because during the pendency of this case, defendant's former counsel joined the same two-attorney prosecutor's office that pursued the case against him, we hold that it was plain error for the trial court to fail to explore the matter and to make a ruling that the prosecutor's office employed appropriate safeguards to prevent Steiger from sharing information about defendant's case with McLennan. Indeed, when confronted by an apparent conflict of interest of this magnitude, it is incumbent upon the trial court to fully explore the matter to determine whether disqualification of the prosecutor's office is warranted and whether the failure to do so prejudiced defendant.

Defense counsel's decision to "switch sides" by joining the two-attorney prosecutor's office that prosecuted defendant raises serious concerns about the fair administration of justice. And, despite a clear obligation to do so, neither defense counsel nor the prosecutor took any steps that would allow the court to determine the extent of the conflict and what steps the prosecutor's office took to minimize potential prejudice. Moreover, when confronted by evidence of this conflict, the trial court also failed to conduct a hearing to determine whether disqualification of the prosecutor's office is necessary. This was plainly erroneous and, therefore, we remand this matter for an evidentiary hearing on this issue.

Our caselaw does not offer a wealth of guidance about the trial court's inquiry with regard to a conflict

of interest, but our Supreme Court has held that, in order to disqualify an entire prosecutor's office, a court must consider "the extent to which knowledge has been shared by the disqualified lawyer and the disqualified lawyer's role within the prosecutor's office." *In re Osborne*, 459 Mich 360, 369-370; 589 NW2d 763 (1999), citing *Doyle, supra* at 644-647.[3] We further hold, as a majority of other jurisdictions have held, that, under these circumstances, in order "to ensure faith in the impartiality and integrity of the criminal justice system, and to prevent a chilling effect on a defendant's willingness to confide in defense counsel, the entire prosecutor's office will be presumed to be privy to the confidences obtained by the former defense lawyer." *State v McClellan*, 179 P3d 825,

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[3] In *Doyle*, this Court held that a conflict of interest affecting one prosecutor does not necessarily require disqualification of the entire prosecutor's office, unless the conflict affects the elected county prosecutor himself. *Doyle*, 159 Mich App at 644-645. The Court explained:

> When a court determines that a conflict of interest exists, the question then arises as to whether the circumstances require recusal of the prosecutor's entire office or only of the particular prosecuting attorney. The general rule is that a conflict of interest involving the elected county prosecutor himself requires recusal of the prosecutor and the entire staff. Since assistant prosecutors act on behalf of the elected county prosecutor and are supervised by him, the policies of fairness to the defendant and the avoidance of an appearance of impropriety require this result. 31 ALR 3d 953. When the conflict of interest involves an assistant prosecuting attorney, as in these cases at bar, recusal of the entire prosecutor's office is not automatic. [*Id*.]

We take judicial notice that the 2007 Michigan Bar Journal directory lists Steiger as the county prosecutor for Presque Isle. The 2006 directory lists McLennan in this position and defendant's trial was held in April 2006. Defendant does not submit that Steiger was the elected county prosecutor at the time of trial. Assuming, for the present, that Steiger was not the elected prosecutor at the time of defendant's trial, disqualification of the entire office would not be automatic under *Doyle*.

831 (Utah App, 2008).[4] Thus, once a defendant has shown that a member of the prosecutor's office counseled him or represented him in the same or related matter, a presumption arises that members of the prosecutor's office have conferred about the matter. See, e.g., *Lux v Commonwealth*, 24 Va App 561, 575; 484 SE2d 145 (1997). To rebut the presumption of shared confidences, the prosecutor must show that "effective screening procedures have been used to isolate the defendant's former counsel from the prosecution of the substantially related criminal charges." *McClellan, supra* at 831.

In *Manning v Waring, Cox, James, Sklar & Allen*, 849 F2d 222, 225 (CA 6, 1988), the United States Court of Appeals for the Sixth Circuit rejected the district court's automatic disqualification of a law firm based on one attorney's conflict of interest, but it imposed on the firm the burden of establishing that no improper communications had been made, and that it had implemented adequate safeguards against future improper communications. We find the reasoning in *Manning* persuasive in the criminal context, especially in view of the heightened due process concerns.[5] The court cited a

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[4] See also *State v Kinkennon*, 275 Neb 570, 576 n 9; 747 NW2d 437 (2008), citing *United States v Goot*, 894 F2d 231 (CA 7, 1990); *United States v Caggiano*, 660 F2d 184 (CA 6, 1981); *Hart v State*, 62 P3d 566 (Wy, 2003); *Matter of RB*, 583 NW2d 839 (SD, 1998); *State v Dambrell*, 120 Idaho 532; 817 P2d 646 (1991); *State v Camacho*, 329 NC 589; 406 SE2d 868 (1991); *Frazier v State*, 257 Ga 690; 362 SE2d 351 (1987); *State v Bunkley*, 202 Conn 629; 522 A2d 795 (1987); *State v McKibben*, 239 Kan 574; 722 P2d 518 (1986); *State v Fitzpatrick*, 464 So 2d 1185 (Fla, 1985); *Young v State*, 297 Md 286; 465 A2d 1149 (1983); *Collier v Legakes*, 98 Nev 307; 646 P2d 1219 (1982); *State v Tippecanoe Co Court*, 432 NE2d 1377 (Ind, 1982); *State v Cline*, 122 RI 297; 405 A2d 1192 (1979); *State v Bell*, 346 So 2d 1090 (La, 1977); *Upton v State*, 257 Ark 424; 516 SW2d 904(1974).

[5] In *Caggiano*, the Sixth Circuit noted that government employees generally have *less* reason to share confidential information because they

presumption of shared confidences and directed the district court to determine whether that presumption had been rebutted. *Id*. The court observed:

> Specifically, under the circumstances of this case as presented by the parties on appeal, it must be determined whether the confidences which [the attorney] acquired from the bank in the course of his prior representation and brought with him to [the firm] have been passed on, or are likely to be passed on, to members of the firm. *Schiessle v. Stephens,* 717 F. 2d 417, 421 (7th Cir. 1983). One method of rebutting the presumption is by demonstrating that specific institutional screening mechanisms have been implemented to effectively insulate against any flow of confidential information from the quarantined attorney to other members of his present firm. *LaSalle Nat'l Bank v County of Lake,* 703 F. 2d 252 (7th Cir. 1983). [*Manning, supra* at 225.]

To determine whether the prosecutor has rebutted the presumption of shared confidences, the court must consider whether the prosecutor's office utilized formal screening procedures to insulate McLennan from Steiger's knowledge of the case, whether Steiger participated in any aspect of the prosecution of the case, whether Steiger took part in discussions about the prosecution or otherwise revealed information to McLennan, and whether Steiger had access to defendant's case file. See *State v Davis*, 141 SW3d 600, 612-615 (Tenn, 2004); *Lux, supra*. With regard to ap-

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have no financial interest in the success of the prosecutor's office. However, when it so ruled, the Court had before it ample evidence regarding the circumstances of counsel's decision to join the large prosecutor's office and the safeguards that were in place to prevent the sharing of confidential information. *Caggiano*, *supra* at 186-188. Thus, notwithstanding the Court's observation about the motivations of government counsel, *Caggiano* supports our holding that an inquiry is necessary to determine whether the circumstances of the case require disqualification or whether the failure to conduct such an inquiry resulted in prejudice.

propriate insulation of counsel, the court should consider whether the prosecutor's office implemented "effective, written screening procedures" that take into account "the structural organization of the law firm or office, the likelihood of contact between an attorney with a conflict of interest and the personnel involved in the ongoing representation, and the existence of rules that prevent the attorney with the conflict of interest from accessing files or information pertaining to a particular case . . . ." *Davis, supra* at 615 n 10. We also emphasize that the size of the prosecutor's office is a factor that the trial court must consider to determine whether effective screening occurred.

Here, the trial did not require the prosecutor's office to offer any proof of sufficient safeguards. Although this Court granted defendant's motion for a remand for a *Ginther* hearing, the hearing was inadequate to resolve the conflict of interest question. The trial court erroneously focused on whether defendant could prove actual prejudice arising from the conflict of interest, instead of requiring the prosecutor to prove the absence of impropriety. Consequently, as the record currently stands, defendant's conviction resulted from a trial involving a serious conflict of interest, with no proof that the prosecutor complied with necessary safeguards.

We therefore remand to the trial court for an evidentiary hearing on the question whether the prosecutor's office undertook sufficient safeguards to prevent McLennan from receiving any communications from Steiger concerning defendant's case. We emphasize that the prosecutor's office bears the burden of establishing that it implemented measures to prevent improper communications and that it consistently followed through with these measures. *Manning, supra* at 227. The trial court's inquiry must be thorough and in-

depth, and take into consideration the prosecutor's failure to come forward with this matter voluntarily, and the office's ability to effectively quarantine the conflict of interest when the office employs only two attorneys. Unless the trial court finds sufficient evidence that the prosecutor's office consistently undertook adequate safeguards to shield McLennan from the taint of Steiger's conflict of interest, defendant's convictions must be reversed and a new trial ordered.[6]

Until the conflict of interest issue is resolved, it is not necessary to consider defendant's remaining ineffective assistance of counsel claims and his sentencing claim.

We remand to the trial court for an evidentiary hearing in accordance with this opinion and we retain jurisdiction.

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[6] We noted earlier that the 2007 Michigan Bar Journal directory lists Steiger as the elected prosecutor for Presque Isle County, although it does not appear he assumed this position until after defendant's trial. If he was the county prosecutor at the time of the trial, defendant is automatically entitled to a new trial.

MICHIGAN EDUCATION ASSOCIATION v SECRETARY OF STATE

Docket No. 280792. Submitted May 7, 2008, at Lansing. Decided August 28, 2008, at 9:05 a.m. Leave to appeal sought.

The Michigan Education Association (MEA) sought a declaratory ruling by the Secretary of State that a payroll deduction by the Gull Lake Public Schools for employee contributions to MEA-PAC, a political action committee of the MEA, pursuant to the terms of a collective-bargaining agreement between the Kalamazoo County Education Association/Gull Lake Education Association and the Gull Lake Public Schools and for which the MEA would reimburse the Gull Lake Public Schools in advance for the cost of administering the payroll-deduction plan, does not violate § 57 of the Michigan Campaign Finance Act (MCFA), MCL 169.257. Section 57 prohibits a public body from using or authorizing the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to, among other things, make a contribution or expenditure. The Secretary of State declared that the payroll-deduction plan in question is violative of § 57 of the MCFA. The MEA petitioned the Ingham Circuit Court for judicial review of the declaratory ruling. The court, Thomas L. Brown, J., determined that the declaratory ruling was arbitrary, capricious, and an abuse of discretion, concluding that no expenditure is made by the Gull Lake Public Schools when it receives advance reimbursement of the cost of administering the payroll-deduction plan. The Secretary of State appealed by leave granted.

The Court of Appeals *held*:

Section 6(1) of the MCFA, MCL 169.206(1), defines "expenditure" as "a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question." The Secretary of State has interpreted the term "expenditure" to include the costs associated with collecting and delivering contributions to a political action committee by payroll deduction, and that interpretation is not contested in this case. Reimbursement of the cost of a payroll-

deduction plan for contributions to a political action committee does not prevent a prohibited expenditure from occurring.

Reversed.

WHITBECK, J., dissenting, stated that the cost of collecting and delivering payroll deductions for contributions of members of the MEA affiliate to the MEA-PAC are not an expenditure under the MCFA. Section 6(2)(c) of the MCFA, MCL 169.206(2)(c), defines "expenditure" to exclude an expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee like the MEA-PAC. Thus, the cost of the payroll-deduction plan at issue cannot be an unlawful expenditure because it is not an expenditure in the first place. The parties should brief, and the Court of Appeals should decide, whether a payroll deduction by a public body constitutes a "contribution" as the MCFA defines that term and whether public bodies such as schools boards, like the Gull Lake Public Schools, have the authority to collect and deliver payroll deductions for contributions by members of a labor union to the union's political action committee.

ELECTIONS — MICHIGAN CAMPAIGN FINANCE ACT — CONTRIBUTIONS TO POLITICAL ACTION COMMITTEES — PUBLIC BODIES — PAYROLL-DEDUCTION PLANS.

A public body makes an expenditure that is prohibited by the Michigan Campaign Finance Act if it administers a payroll-deduction plan for voluntary employee contributions to a political action committee regardless of whether it receives reimbursement for the administrative cost of such a plan (MCL 169.206[1], 169.257).

White, *Schneider*, *Young & Chiodini*, *P.C.* (by *Kathleen Corkin Boyle*), for the Michigan Education Association.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Patrick J. O'Brien*, *Denise C. Barton*, *Heather S. Meingast*, and *Ann M. Sherman*, Assistant Attorneys General, for the Secretary of State.

Amici Curiae:

Foster, *Swift*, *Collins & Smith*, *PC* (by *Eric S. Doster*), for the Michigan Chamber of Commerce.

Sachs Waldman, *P.C.* (by *Andrew Nickelhoff*), for the Michigan State AFL-CIO and Change to Win.

Patrick J. Wright for the Mackinac Center for Public Policy.

Alfred H. Hall and *Michael G. O'Brien* for the Senate Majority Leader, the Senate Majority Floor Leader, and the Senate Campaign and Oversight Committee Chairwoman.

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

O'CONNELL, J. Respondent Secretary of State appeals by leave granted the trial court order setting aside as arbitrary and capricious respondent's declaratory ruling interpreting § 57 of the Michigan Campaign Finance Act (MCFA), MCL 169.201 *et seq*. We reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. THE PARTIES

1. THE SECRETARY OF STATE

The respondent-appellant in this matter is the Secretary of State (the Secretary). The position of Secretary of State is an elective office under the Michigan Constitution. See Const 1963, art 5, § 21. The Secretary is the single executive heading the Department of State (the Department). See Const 1963, art 5, § 3. The Department of State is one of the principal departments in the executive branch of state government. See MCL 16.104(1). The Secretary has certain duties and responsibilities, see MCL 11.4 *et seq*., including the administration of the MCFA, MCL 169.215. Under the MCFA, MCL 169.215(1)(e), and under the Administrative Procedures Act, MCL 24.263, the Secretary of State may

issue "a declaratory ruling as to the applicability to an actual state of facts of a statute."

2. THE MEA

The petitioner-appellee in this matter is the Michigan Education Association (MEA). The MEA is a voluntary, incorporated labor organization that in August 2006 represented some 136,000 members employed by public schools, colleges, and universities throughout Michigan. The MEA's MEA-PAC is a separate segregated fund under § 55 of the MCFA, MCL 169.255. According to the MEA: MEA-PAC is funded in part by MEA member payroll deductions; the MEA or its affiliates have entered into collective bargaining agreements with various public school districts throughout the state; some of those collective bargaining agreements, including the agreement between the Kalamazoo County Education Association/Gull Lake Education Association (presumably affiliates of the MEA) and the Gull Lake Public Schools, include a requirement that the school district employer administer a payroll deduction plan for contributions to MEA-PAC; the Gull Lake collective bargaining agreement also requires the Gull Lake Public Schools to make other payroll deductions, such as the payment of MEA dues and service fees; and in 2006, it proposed that it pay the Gull Lake Public Schools, in advance, for all anticipated costs of Gull Lake Public Schools attributable to administering payroll deductions to MEA-PAC or any other separate segregated fund affiliated with the MEA. The MEA contends that under this proposal, Gull Lake Public Schools would not incur any costs or expenses in administering the requested deductions,

because the Gull Lake Public Schools would be reimbursed, in advance, for such costs and expenses.

3. THE AMICI

Various entities and persons have filed helpful briefs amicus curiae in this matter. They are the Mackinac Center for Public Policy, the Michigan State AFL-CIO and Change to Win, the Michigan Chamber of Commerce, and Senate Majority Leader Michael D. Bishop, Senate Majority Floor Leader Alan Cropsey, and Senator Michelle McManus, Chairwoman of the Senate Campaign and Election Oversight Committee.

B. THE MEA'S REQUEST FOR DECLARATORY RULING

On August 22, 2006, the MEA filed a request for a declaratory ruling by the Secretary. The MEA detailed the facts concerning the Gull Lake Public Schools summarized above and asserted that the administration of the payroll deductions by the school district did not "constitute an 'expenditure' under the MCFA" and did not constitute a violation of § 57 of the MCFA, MCL 169.257. The MEA then requested a declaratory ruling on three questions:

> 1. May the Gull Lake Public Schools continue to make and transmit to MEA-PAC the payroll deductions requested by MEA members through a properly completed, voluntary consent form?
>
> 2. May the Gull Lake Public Schools, consistent with the provisions of the MCFA, administer the payroll deductions to MEA-PAC if either the MEA or MEA-PAC pays the school district, in advance, for any costs associated with administering those payroll deductions?
>
> 3. What costs should be considered by the Gull Lake Public Schools in determining the costs attributable to

> administering the payroll deductions that are to be transmitted to the PAC [political action committee]?

C. THE SECRETARY'S DECLARATORY RULING

On November 20, 2006, the Secretary issued her declaratory ruling in response to the MEA's request. Regarding the MEA's first question, the Secretary noted that the Department of State and the Attorney General had both concluded that a public body is prohibited from collecting and remitting contributions to a "committee" through its administration of a payroll deduction plan. The Secretary noted that § 55 of the MCFA allowed the named private entities to make "expenditures" for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. However, citing § 55(1) and § 57, the Secretary went on to note that "no corresponding provision authorizes a public body to do so." The Secretary stated that "[t]he Department is constrained to conclude that the school district is prohibited from expending government resources for a payroll deduction plan that deducts wages from its employees on behalf of MEA-PAC."

Regarding the MEA's second question, the Secretary stated that the Department was mindful of the Attorney General's recent conclusion that

> a violation [of § 57] could not be avoided by requiring the union to pay the anticipated costs before they are incurred. The language of MCL 169.257(1) unqualifiedly prohibits the use of public resources for the described purposes, making no exception for compensated uses. [OAG, 2005-2006, No 7187, p 81 (February 16, 2006).]

The Secretary stated that this opinion was consistent with the Department's previous position, citing

several previous interpretative statements, and that the Department saw no reason to depart from this rationale. The Secretary also concluded that it was unnecessary to address the MEA's third question, given her response to the first and second questions.

D. THE TRIAL COURT'S DECISION

The MEA filed in the Ingham Circuit Court a petition for review challenging the Secretary's declaratory ruling.[1] On September 4, 2007, the trial court issued its opinion setting aside the Secretary's declaratory ruling. The trial court summarized the Secretary's declaratory ruling and stated: "This means that unions cannot take voluntary payroll deductions from their member employees and contribute those funds to PACs established by the unions, if the employees in the union work for a public body."

After stating the standard of review contained in the Administrative Procedures Act, MCL 24.306(1),[2] the provisions of § 57 of the MCFA, and the positions of the parties, the trial court determined that the Secretary's declaratory ruling was "arbitrary, capricious, and an abuse of discretion." The trial court concluded that under the plain language of § 57, the administration of payroll deductions to a union PAC constitutes an "expenditure" under the MCFA. The trial court then stated:

> However, where the costs of administration are reimbursed, no transfer of money to the union PAC occurs, and therefore an "expenditure" has not been made within the meaning of the MCFA. Thus, a public body may administer payroll deductions so long as all costs of making deductions

[1] "A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case." MCL 24.263.

[2] See also Const 1963, art 6, § 28.

> are reimbursed by the PAC. § 57 does not explicitly prohibit a public body from administering the payroll deduction requests of its employees.

The trial court also disagreed with the Secretary's assertion that her declaratory ruling was consistent with past rulings and statements. While the trial court agreed with the Secretary that she is free to make prospective changes in the course and direction of the declaratory rulings, it stated that such changes "must not be arbitrary, capricious, or in violation of any other law." The trial court concluded that the Secretary made such an arbitrary change when she issued her declaratory ruling. The trial court then held that public bodies, such as the Gull Lake Public School system, may "administer payroll deductions requested by their employees, provided that all expenses of making the deductions are borne by the PAC or its sponsoring labor organization and are paid in advance."

E. THE SECRETARY'S APPEAL

On September 27, 2007, the Secretary filed an application for leave to appeal the trial court's decision, and on December 19, 2007, a panel of this Court granted that application. In her brief on appeal, the Secretary outlined the question involved as follows:

> The Secretary of State issued a declaratory ruling that § 57 of the Michigan Campaign Finance Act prohibits a school district, as a public body, from administering a payroll deduction plan on behalf of a union's political action committee and that a violation could not be remedied by a union's reimbursement of the costs associated with administering such a plan. On appeal, the circuit court found that the plain language of § 57 prohibited the administration of payroll deductions by a union political action committee, but that where the costs of administration are reimbursed in advance, a violation does not occur.

Was the circuit court correct in finding that the declaratory ruling by the Secretary of State was arbitrary, capricious, and an abuse of discretion?

II. STANDARD OF REVIEW

We review de novo questions of statutory interpretation. *Faircloth v Family Independence Agency*, 232 Mich App 391, 406; 591 NW2d 314 (1998).

> [A]gency interpretations are entitled to respectful consideration, but they are not binding on courts and cannot conflict with the plain meaning of the statute. While the agency's interpretation may be helpful in ascertaining the legislative intent, courts may not abdicate to administrative agencies the constitutional responsibility to construe statutes. Giving uncritical deference to an administrative agency would be such an improper abdication of duty. [*In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 117-118; 754 NW2d 259 (2008).]

III. STATUTORY INTERPRETATION

MCL 169.257(1) provides, in pertinent part:

> A public body[3] or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under section 4(3)(a).

The MCFA defines "expenditure" as "a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate,

[3] There is no dispute that a school district is a public body and, therefore, governed by MCL 169.257.

or the qualification, passage, or defeat of a ballot question." MCL 169.206(1). "[W]hen a statute specifically defines a given term, that definition alone controls." *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996). The Secretary previously issued an interpretive statement indicating that "the department interprets the term 'expenditure' to include the costs associated with collecting and delivering contributions to a committee" and that "[a] payroll deduction system is one method of collecting and delivering contributions." Interpretative Statement to Mr. Robert LaBrant (November 14, 2005).

None of the parties appears to question this interpretation.[4] Rather, as stated above, the sole issue before us is whether, under the MCFA, advance reimbursement for the costs of a payroll deduction system prevents what is otherwise an illegal expenditure from ever becoming an "expenditure." We conclude that it does not. We find nothing in the plain language of the MCFA that indicates reimbursement negates something that otherwise constitutes an expenditure. This Court presumes that the Legislature intended the meaning clearly expressed in unambiguous statutory language, and no further construction is required or allowed. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). We note that although MCL 169.204(3)(c) provides that "[a]n offer or tender of a contribution, if expressly and unconditionally rejected, returned, or refunded in whole or in part within 30 business days after receipt" is not a contribution, MCL 169.206(2)(e) provides that only rejection and return prevent an expenditure and does not permit

[4] In fact, the trial court and the appellate briefs concede that an expenditure has occurred absent the asserted magical effects of prior reimbursement.

"refund." "[N]othing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). We may not assume that the omission of the term "refund" from MCL 169.206(2)(e) was inadvertent. *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 530; 734 NW2d 533 (2007).

We also conclude that reimbursement, advance or otherwise, does not prevent an otherwise illegal expenditure from ever becoming an expenditure because "there is no transfer of value." Contrary to the trial court's reasoning, a transfer of value has occurred because there is time spent by employees that monetary reimbursement cannot return. For example, it takes employees to distribute voluntary payroll deduction forms, receive the signed forms, make certain the forms conform to legal requirements, enter the information into the payroll system, and update the information yearly. Although monetary reimbursement can compensate the school district for the salary paid for the time spent by the employees performing those functions, the time spent on non-school district business is irretrievably lost and cannot be recovered. This work constitutes a transfer of value for which monetary reimbursement is insufficient. Accordingly, reimbursement does not prevent an expenditure from occurring. The trial court erred by concluding that reimbursement prevents an expenditure from occurring, and its declaratory ruling was arbitrary and capricious.

IV. ADDITIONAL ISSUES

The dissent raises two issues that were not set forth in the statement of questions presented on appeal, nor were they raised by any of the nine parties or amici in

their briefs or at oral argument. We are not obligated to consider issues not properly raised and preserved or those that were first raised on appeal, *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994); *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993), and we generally do not consider any issues not set forth in the statement of questions presented, *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). We, therefore, decline to address them because they are not properly before us. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Although the dissent's legal argument may "have substantive merit, it can be of no avail [because each of the parties and amici] failed to raise the issue in a timely fashion." *Forton v Laszar*, 463 Mich 969, 970 (2001) (CORRIGAN, C.J., concurring).[5]

If the parties wish to make arguments to resolve these "other issues," they are free to file a separate lawsuit.

[5] The dissent's description of the MCFA as a "self-contained looking-glass" full of circus type mirrors may be accurate. However, in light of the MCFA prohibitions, we believe that the dissent "has traveled one mirror too far." Unlike § 55 for corporations, § 57 does not authorize a public body to make expenditures to establish, administer, or solicit "contributions" for a management PAC, nor is there authorization to administer a payroll deduction plan for "contributions" to a separate segregated fund. Absent such authorization, school districts are prohibited from engaging in the political process. In our opinion, the prohibition on expenditures and contributions, coupled with the absence of express permission for a payroll deduction plan, should end the discussion.

We concede that the Legislature may have the authority to allow public bodies to engage in some limited form of partisan politics. However, until the Legislature explicitly makes such a pronouncement, courts should be reluctant to allow public bodies to engage in any form of politics. Sincere advocates can read self-contained looking-glass legislation and reach different results, but it is beyond question that the intent of this legislation was to prevent taxpayer funded public bodies from engaging in partisan politics. In our view, the methodological manner in which the dissent interprets the MCFA turns the statute upside down and inside out, resulting in permission for that which the statute was intended to prevent.

However, this Court should not sua sponte create issues on appeal and then remand to the trial court for a determination of those issues, or request additional briefing to dispose of the issues for the first time on appeal.[6]

We reverse the circuit court's order. We do not retain jurisdiction.

WILDER, P.J., concurred.

WHITBECK, J. (*dissenting*). I respectfully dissent. The majority posits the issue before us as whether under the

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[6] If we were to address the dissent's issues, we would still reverse. The MCFA treats public entities and private entities differently. Compare MCL 169.254 with 169.257. Given this differential treatment, we would conclude that the allocated costs of collecting and delivering payroll deductions by members of the MEA affiliate to the MEA-PAC are both an expenditure and a contribution to the MEA-PAC by the Gull Lake Public Schools. See OAG, 2005-2006, No 7187, p 81 (February 16, 2006) (concluding that "[a] public body's use of its resources to administer the payroll deduction plan would 'cause' the contribution to 'happen,' and thus violate section 57").

Under our system of government, public bodies should not participate in the political process. To effectuate this, our Legislature prohibited them from making "expenditures" and "contributions." MCL 169.257(1). Over time, the prohibition became more detailed, and now includes "the use or authoriz[ation of] the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure . . . ." *Id*. Numerous Attorney General opinions have made this proposition clear. See, e.g., OAG, 1993-1994, No 6763, p 45 (August 4, 1993) ("School districts may not permit their offices and phone equipment to be used in a restrictive manner for advocacy of one side of a ballot issue . . . . School districts may not endorse a particular candidate or ballot proposal."); OAG, 1965-1966, No 4291, p 1 (January 4, 1965) (school district not allowed to spend funds to advocate a favorable vote on a tax and bond ballot proposal). Given the consistency with which the MCFA has been interpreted to prohibit public bodies from spending public funds or otherwise utilizing public resources paid for by all taxpayers to advocate for a particular political position or candidate, it is absolutely illogical, inconsistent, and contrary to the very purpose of MCL 169.257 to conclude that it is permissible for a school district (a public body) to administer payroll deductions sent to MEA-PAC (a group whose very purpose is to advocate for various political positions and candidates).

Michigan Campaign Finance Act (MCFA) "advance reimbursement for the costs of a payroll deduction system prevents what is otherwise an illegal *expenditure* from ever becoming an 'expenditure.' "[1] The majority concludes it does not. I disagree. Under the particular, and peculiar, definitions contained in the self-contained looking-glass[2] world of the MCFA, the costs of such payroll deduction systems are not "expenditures" at all. Thus, the trial court reached the right result, although for the wrong reason. I would affirm the trial court on the basis that the allocated costs of administration by the Gull Lake Public Schools, for example, for collecting and delivering payroll deductions for "contributions" by members of the Michigan Education Association (MEA) affiliate to the MEA-PAC do not constitute an "expenditure" *as the MCFA defines that word*.

In my view, however, that should not end the inquiry; it should only begin it. As a separate and distinct matter, I would ask the parties to brief the questions (1) whether, using the situation at the Gull Lake Public Schools as an example, the allocated costs of collecting and delivering payroll deductions by members of the MEA affiliate to the MEA-PAC are a *contribution* to the MEA-PAC by the Gull Lake Public Schools as the MCFA defines contributions and, if so, whether such costs are a prohibited contribution under § 57 of the MCFA; and (2) whether public bodies such as school boards, like the Gull Lake Public Schools, have the *authority* to collect and deliver payroll deductions for contributions by members of a union to that union's PAC. I would then decide these issues in a timely and comprehensive opinion.

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[1] Emphasis added.

[2] " 'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' " Lewis Carroll, *Through the Looking Glass* (1872).

I. INTRODUCTION

This case involves the application of certain provisions of the MCFA.[3] The MCFA is a comprehensive, wide-ranging statute and has been the subject of a number of interpretations, declarations, and opinions by the Secretary of State, the Attorney General, and various state and federal courts. It contains a multitude of prohibitions, authorizations, delineations, limitations, and other provisions applicable only to a self-contained looking-glass world, that of campaign finance. To extend the metaphor, behind the looking glass lies a bewildering and Byzantine hall of mirrors. It is therefore of considerable importance to understand the general "architecture" of the MCFA as it relates to the issues in this case, to identify the provisions of the MCFA that are relevant here, and then to apply these provisions to the facts as the parties have presented them to this Court.

II. THE ARCHITECTURE OF THE MCFA

A. SECTION 54 PROHIBITION ON CORPORATE CONTRIBUTIONS AND EXPENDITURES

As a starting point, I emphasize that § 54 of the MCFA,[4] with certain important exceptions, broadly prohibits corporations, joint stock companies, domestic dependent sovereigns,[5] and labor organizations, as well as those acting for such entities, from making "a contribution or expenditure or provid[ing] volunteer

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[3] MCL 169.201 *et seq*.

[4] MCL 169.254.

[5] Defined as Indian tribes that have been acknowledged, recognized, restored, or reaffirmed as an Indian tribe by the Secretary of the Interior under the Indian Reorganization Act or have otherwise been acknowledged by the United States government as an Indian tribe. See MCL 169.205(1).

personal services that are excluded from the definition of a contribution pursuant to [MCL 169.204(3)(a)]."

First, as a housekeeping matter, I observe that this matter does not involve "volunteer personal services." Rather, this Court is concerned here with "contributions" and "expenditures" as the MCFA defines those words.

Second, as a point of interest, the MEA asserts that it is "a voluntary *incorporated* labor organization."[6] Both as a corporation and a labor organization, therefore, the MEA cannot make a "contribution" or an "expenditure" as the MCFA defines those words. But a corporation that is not a labor organization, such as General Motors for example, also cannot make a "contribution" or an "expenditure" as the MCFA defines those words. Thus, in the MCFA's self-contained looking-glass world of campaign finance, § 54 now treats corporations, joint stock companies, domestic dependent sovereigns, and labor organizations exactly alike with respect to its broad prohibition against "contributions" and "expenditures."

Thirdly, however, there are several exceptions to § 54's broad prohibitions. These exceptions are contained in the first sentence of § 54(1):

> Except with respect to the exceptions and conditions in subsections (2)[7] and (3)[8] *and section 55*,[9] and to loans made in the ordinary course of business, a corporation, joint stock company, domestic dependent sovereign, or labor organization shall not make a contribution or expenditure . . . .[10]

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[6] Emphasis added.

[7] MCL 169.254(2).

[8] MCL 169.254(3).

[9] MCL 169.255.

[10] MCL 169.254(1) (emphasis added).

Neither the exceptions and conditions in § 54(2)[11] nor the exceptions and conditions in § 54(3)[12] are directly relevant here. Nor are loans in the ordinary course of business. But the exception related to § 55[13] *is* directly relevant. I will cover § 55 below; it is sufficient here only to note that under § 54, the exceptions and conditions in § 55 constitute an *exception* to the broad prohibition against "contributions" and "expenditures," as the MCFA defines those terms, by the named private entities (that is, corporations, joint stock companies, domestic dependent sovereigns, and labor organizations).

Finally, I observe that § 54 covers only the named private entities. There is an absolutely deafening silence in § 54 with respect to public bodies, such as school districts. Generally speaking, this is understandable. This Court does not expect public bodies to participate in the political process and certainly not by the way of making "expenditures" and "contributions."[14]

B. "CONTRIBUTIONS" AND "EXPENDITURES"

To find one's way through the MCFA's hall of mirrors, one must understand and use its definitions, particularly the definitions of "contributions"[15] and "expenditures."[16] I have summarized these definitions below:

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[11] MCL 169.254(2).

[12] MCL 169.254(3).

[13] MCL 169.255.

[14] See, e.g., OAG, 1993-1994, No 6763, p 45 (August 4, 1993) ("School districts may not permit their offices and phone equipment to be used in a restrictive manner for advocacy of one side of a ballot issue . . . . School districts may not endorse a particular candidate or ballot proposal."); OAG, 1965-1966, No 4291, p 1 (January 4, 1965) (school district not allowed to spend funds to advocate a favorable vote on a tax and bond ballot proposal).

[15] MCL 169.204.

[16] MCL 169.206.

"Contributions"	"Expenditures"
" 'Contribution' means a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question."[17] But a "contribution" does not include "volunteer personal services," "[f]ood and beverages, . . . which are donated by an individual," or "[a]n offer or tender of a contribution if expressly and unconditionally rejected, returned, or refunded in whole or in part within 30 business days after receipt."[18]	" 'Expenditure' means a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question."[19] But an expenditure does not, among other things, include "[a]n expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee."[20]

I make four observations based on these definitions. First, I observe that the definitions are all encompassing within the self-contained looking-glass world of campaign

[17] MCL 169.204(1).

[18] MCL 169.204(3).

[19] MCL 169.206(1).

[20] MCL 169.206(2)(c).

finance. To some extent the definitions are also parallel, and perhaps even somewhat overlapping. In the case of a "contribution," the definition covers any type of payment[21] to influence the "nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question." In the case of an "expenditure," the definition covers not only payments but also donations, loans, and promises of the payment of money or anything of ascertainable monetary value for "goods, materials, services, or facilities" "in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question."

Second, I observe that the definition of a "contribution" is subject to several exceptions, none of which is relevant here.[22]

Third, I observe that the definition of an "expenditure" is also subject to a number of exceptions, one of which is directly relevant here. Under that exception, an "expenditure" for the "establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee" is *not* an "expenditure" for the purposes of the MCFA.[23]

Fourth, I observe that there is no indication in the definitions of "expenditure" and "contribution" that either definition is limited to the named private entities in § 55.

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[21] Including "the full purchase price of tickets or payment of an attendance fee for events such as dinners, luncheons, rallies, testimonials, and other fund-raising events; an individual's own money or property other than the individual's homestead used on behalf of that individual's candidacy; the granting of discounts or rebates not available to the general public; or the granting of discounts or rebates by broadcast media and newspapers not extended on an equal basis to all candidates for the same office; and the endorsing or guaranteeing of a loan for the amount the endorser or guarantor is liable." MCL 169.204(2).

[22] See MCL 169.255(3).

[23] MCL 169.206(2)(c).

C. SECTION 55 AND AUTHORIZED ACTIVITIES FOR PRIVATE ENTITIES

Section 55 of the MCFA[24] *authorizes* the named private entities (that is, corporations, either for profit or nonprofit, joint stock companies, domestic dependent sovereigns, and labor organizations) to make "expenditures" for the establishment and administration and solicitation of "contributions" for separate segregated funds to be used for political purposes. Again, then, § 55 is an important *exception* to § 54's broad prohibition against such named private entities making either "contributions" or "expenditures" as defined in the MCFA. With respect to separate segregated funds, therefore, the named private entities can make "expenditures" for the establishment, administration, and solicitation of "contributions" to such separate segregated funds. But § 55, in turn, expressly *limits* such separate segregated funds to making "contributions" to and "expenditures" on behalf of another set of named entities: "candidate committees, ballot question committees, political party committees, political committees, and independent committees."[25]

I observe that the term "political action committee" (PAC) is not defined in the MCFA. It comes from federal election law[26] and, according to the Secretary, is a term of art that has gained common acceptance and usage to describe independent committees or political committees, apparently including separate segregated funds, established under the MCFA to support or oppose candidates. According to the MEA, the MEA-PAC is a separate segregated fund and has regularly filed with the Secretary of State the campaign finance reports required by the MCFA.[27]

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[24] MCL 169.255.

[25] MCL 169.255(1).

[26] See, generally, 2 USC 431(4).

[27] See MCL 169.224.

Section 55 also *delineates* those who can be solicited for "contributions" to a separate segregated fund to the following persons or their spouses:

For Profit/Joint Stock Company	Nonprofit	Labor Organization
Stockholders of the corporation or company; officers and directors of the corporation or company; and employees of the corporation or company who have "policy making managerial, professional, supervisory, or administrative nonclerical responsibilities."[28]	Members of the corporation who are individuals; stockholders of members of the corporation; officers or directors of members of the corporation; employees of the members of the corporation who have "policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities"; and employees of the corporation who have "policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities"[29]	Members of the labor organization who are individuals; officers or directors of the labor organization; and employees of the labor organization who have "policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities."[30]

Section 55 also has one further *authorizing* provision. This provision states:

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[28] MCL 169.255(2).

[29] MCL 169.255(3).

[30] MCL 169.255(4). See also MCL 169.255(5) relating to domestic dependent sovereigns.

> A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization *may solicit or obtain contributions for a separate segregated fund* established under this section from an individual described in subsection (2), (3), (4), or (5) *on an automatic basis, including but not limited to a payroll deduction plan, only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year*.[31]

Thus, in the § 55 private arena, automatic payroll deduction plans for obtaining "contributions" to a separate segregated fund are permissible only if the delineated individuals in § 55(2) (for corporations and joint stock companies),[32] § 55(3) (for nonprofit corporations),[33] and § 55(4) (for labor organizations)[34] who make "contributions" affirmatively consent to the payroll deduction of such "contributions" at least once in every calendar year.

But the § 55 private arena encompasses *only* the named private entities under that section: for-profit and nonprofit corporations, joint stock companies, domestic dependent sovereigns, and labor organizations. Thus, § 55 deals only with private entities. It is silent with respect to public bodies, such as school districts. However, § 57 of the MCFA[35] deals directly with such public bodies.

D. SECTION 57 AND PROHIBITED ACTIVITIES FOR PUBLIC BODIES

In contrast to § 55, § 57 of the MCFA is a *prohibitive* provision; it does not authorize a public body to do

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[31] MCL 169.255(6) (emphasis added).

[32] MCL 169.255(2).

[33] MCL 169.255(3).

[34] MCL 169.255(4).

[35] MCL 169.257.

anything. Rather, § 57 provides, with certain exceptions not relevant here,[36] that a public body, or an individual acting for a public body, shall *not* "use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure . . . ."[37]

Second, § 57 uses the term "public body." This is also a defined term under the MCFA. It includes state agencies,[38] the Legislature or an agency of the legislative branch of state government,[39] and "[a] county, city, township, village, intercounty, intercity, or regional governing body; a council, *school district*, special district, or municipal corporation; or a board, department, commission, or council or any agency of a board, department, commission, or council."[40]

The term "public body" also includes "[a]ny other body that is created by state or local authority or is primarily funded by or through state or local authority, which body exercises governmental or proprietary authority or performs a governmental or propriety function."[41]

Third, there is *no* counterpart in § 57 to the provision in § 55 that authorizes the named private entities (that is, for-profit or nonprofit corporations, joint stock companies, and labor organizations) to make "expenditures" for the establishment and administration and solicitation of "contributions" to separate segregated funds. Thus, a public body, such as a state agency or a

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[36] See MCL 169.257(1)(a) through (f).

[37] MCL 169.257(1).

[38] MCL 169.211(6)(a).

[39] MCL 169.211(6)(b).

[40] MCL 169.211(6)(c) (emphasis added).

[41] MCL 169.211(d).

school district, is *not* authorized under § 57 to make "expenditures" to establish, administer, or solicit "contributions" for a management PAC. Labor organizations may arguably utilize their authority under § 55 to establish and administer union PACs (such as the MEA-PAC). But in situations where the members of the labor organization are employees of a public body, there can be, and are, no side-by-side management PACs because there is no authorization in the MCFA or elsewhere for a public body to establish or administer a management PAC. It would be incongruous, and indeed illegal, for a public body, such as a school district, to use public resources to establish, administer, and solicit "contributions" for its own management PAC to be used for political purposes. Indeed, the Michigan State AFL-CIO and Change to Win state that it is "well-established" that public bodes may not establish, administer, or solicit contributions to their own separate segregated funds.

Fourth, and as an extension of the above, there is no counterpart in § 57 to the authorization in § 55[42] for automatic payroll deduction plans to obtain "contributions" to a separate segregated fund when the delineated individuals who make such "contributions" affirmatively consent to the payroll deduction of such "contributions" at least once in every calendar year.

E. CONCLUSIONS

I conclude that § 54 of the MCFA prohibits the named private entities (that is, corporations, joint stock companies, domestic dependent sovereigns, and labor organizations) from making "expenditures" and "contributions" as the MCFA defines these terms. But there are

[42] MCL 169.255(6).

important qualifications to this conclusion. First, there are several exceptions to § 54's overall prohibitions, including § 55's authorized "expenditures" for the establishment, administration, and solicitation of "contributions" to separate segregated funds. Second, § 54's prohibitions extend only to a specific set of named *private* entities. That set does not include public bodies, such as school districts.

I also conclude that the MCFA contains a number of definitions that are applicable in the self-contained looking-glass world of campaign finance, including the definitions of the word "contribution" and the word "expenditure." Most importantly, the MCFA states that the definition of "expenditure" does *not* include the "establishment, administration, or solicitation of contributions" to a separate segregated fund. Therefore, to the extent that there are costs involved in the establishment, administration, or solicitation of "contributions" to a separate segregated fund, those costs are *not* "expenditures" as the MCFA defines that word. This is true whether the entity involved is private or public.

I further conclude that § 55 does four things. It *authorizes* the named private entities to undertake certain activities, including the making "of expenditures" for the establishment, administration, and solicitation of "contributions" to separate segregated funds. Thus, § 55 creates—and § 54 recognizes—an exception to the broad prohibition against those named private entities making either a "contribution" or an "expenditure."

But § 55 also *limits* such separate segregated funds to certain activities: the making of "contributions" to and "expenditures" on behalf of candidate committees, ballot question committees, political party committees, political committees, and independent committees. Sec-

tion 55 also *delineates* those individuals who can be solicited for "contributions" to separate segregated funds.

Finally, § 55 contains a further provision specifically *authorizing* the named private entities to solicit or obtain "contributions" for a separate segregated fund on an automatic basis, including but not limited to payroll deduction plans, only if the individual who is solicited affirmatively consents to the "contributions" at least once each calendar year. As with the § 54 prohibitions, the § 55 authorizations, limitations, and delineations extend only to a set of named *private* entities. That set does not include public bodies, such as school districts.

I also conclude that § 57 flatly prohibits a public body from using its resources to make a "contribution" or an "expenditure" *as the MCFA defines those words*. And there is no counterpart in § 57 to the authorizations, limitations, and delineations in § 55 that pertain to private entities. Specifically, there is no authorization in § 57 for a public body to administer a payroll deduction plan for "contributions" to a separate segregated fund.

III. "EXPENDITURES" BY PUBLIC BODIES

The trial court's decision starts with the proposition that the administration of payroll deductions to a union PAC constitutes an "expenditure" under the MCFA. I disagree with this threshold conclusion. It is well to be clear here about the factual circumstances. The "administration" to which the trial court referred is the allocated costs of, for example, the Gull Lake Public Schools when that entity uses its resources, of whatever type or kind, to collect and deliver the payroll deductions of "contributions" of, for example, members of the Kalamazoo County Education Association/Gull Lake

Education Association to the MEA-PAC. The Gull Lake Public Schools system is a "school district" and is therefore a "public body" under the MCFA.[43] As I noted earlier, the MEA-PAC is a separate segregated fund under the MCFA.[44] The threshold question, then, is whether the allocated costs of administration by the Gull Lake Public Schools for collecting and delivering payroll deductions for "contributions" by members of the MEA affiliate to the MEA-PAC constitute an "expenditure" *as the MCFA defines that word*.

In my opinion, such costs do not constitute such an "expenditure." I base this conclusion on the plain and simple language of the MCFA. As I noted before, the definition of "expenditure" does not include expenditures for the "establishment, administration, or solicitation of contributions to a separate segregated fund . . . ."[45] The costs of administration, including the allocated costs of administration by the Gull Lake Public Schools of collecting and delivering payroll deductions for "contributions" by members of the MEA affiliate to the MEA-PAC, are therefore *not* expenditures *as the MCFA defines that word*. While these allocated costs of administration are most certainly costs, they are most certainly not "expenditures" in the self-contained looking-glass world of the MCFA. Simply, in that world, such allocated costs of administration do not constitute "expenditures" *as the MCFA defines that word*. To the extent that the majority accepts the trial court's threshold conclusion that these allocated costs of administration are "expenditures" *as the MCFA defines that word*, the majority errs.

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[43] See MCL 169.211(6).

[44] See MCL 169.255(1).

[45] MCL 169.206(2)(c).

In a footnote, of all places, the Secretary proffers, without authority, the argument that the exclusion of such costs from the definition of "expenditure" relates only to § 55 private entities and not to § 57 public bodies, stating: "This exclusion pre-existed the enactment of § 57 and relates to § 55's provision of separate segregated funds for corporations, labor organizations, joint stock companies and domestic dependent sovereigns."

This argument is plainly wrong. The MCFA definition of "expenditure" could not be clearer. It specifically excludes an "expenditure" for the "administration" of a separate segregated fund. "[W]hen a statute specifically defines a given term, that definition *alone* controls."[46] Indeed, as the Secretary notes, when the Legislature has defined a term in a statute, that definition must be applied and is binding on the courts.[47] There is no language in the definition of "expenditure" that even remotely suggests that the exclusion in that definition for the costs of administration of a separate segregated fund is limited in the manner that the Secretary claims. "[N]othing may be read into the statute that is not within the manifest intent of the Legislature *as derived from the act itself*."[48] There is no hint in the MCFA that the definition of "expenditure" applies to private entities but does not apply to public bodies. There is no hint of ambiguity in the definition of "expenditure" and, as the Michigan Supreme Court has said, "[w]hen the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted."[49] "In discerning legislative

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[46] *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996) (emphasis added).

[47] *Id*.

[48] *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) (emphasis added).

[49] *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007).

intent, a court must give effect to every word, phrase, and clause in a statute . . . ."[50] "A statute must be read in its entirety and the meaning given to one section arrived at after due consideration of other sections so as to produce, if possible, an harmonious and consistent enactment as a whole." [51]

Further, I note that the Legislature amended the definition of "expenditure" as recently as 2003[52] without limiting the exclusion in that definition for the costs of administration of a separate segregated fund. And the Legislature is also presumed to be aware of all existing statutes when it enacts another.[53] Here, when the Legislature enacted § 57 relating to public bodies, it specifically selected the word "expenditure," a pre-existing defined term under the MCFA with a pre-existing exclusion. Again, there is simply no support for the proposition that the definition of "expenditure," and the exclusion in that definition for the costs of administration of a separate segregated fund, does not apply to § 57 public bodies. Nor does a public body trigger the application of § 57's prohibitions when it collects and delivers payroll deductions for "contributions" by members of a labor organization to a union PAC because the cost of the administration of such collection and delivery is not an "expenditure" *as the MCFA defines that term*.

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[50] *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004) (internal quotations and citation omitted).

[51] *State Treasurer v Wilson*, 423 Mich 138, 145; 377 NW2d 703 (1985). See also *People v Hill*, 192 Mich App 102, 114-115; 480 NW2d 913 (1991).

[52] See 2003 PA 69.

[53] *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). See also *Malcom v City of East Detroit*, 437 Mich 132, 138; 468 NW2d 479 (1991), superseded by statute as stated in *Vine v Ingham Co*, 884 F Supp 1153 (WD Mich, 1995).

Thus, at the threshold, the allocated costs of administration by the Gull Lake Public Schools, for example, of collecting and delivering payroll deductions for "contributions" by members of the MEA affiliate to the MEA-PAC are not an "illegal expenditure" under the MCFA. Rather, as the MCFA defines that word, these allocated costs are not an "expenditure" at all. To the extent that the majority now accepts the Secretary's proposition that such costs are an "illegal expenditure" under the MCFA,[54] I believe the majority to be wrong.

Further, to the extent that the majority concludes that the reimbursement of such an "illegal expenditure" fails to negate something that otherwise constitutes an "expenditure,"[55] I believe the majority overreaches in the sense that it comes to a conclusion that it need not make. The legality of the "rental," as the Mackinac Center colorfully puts it, of the apparatus of a public body to collect and deliver contributions to public employee union PACs through the device of an advance reimbursement for the costs of such collection and delivery should not be decided here if this Court recognizes that such costs are not "expenditures" at all.

IV. ADDITIONAL ISSUES

A. OVERVIEW

Despite the majority's position that they "are not properly before us," I find that this Court should consider certain additional issues. Those issues include (1) the meaning of the exclusion contained in the definition of "expenditure" for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee; (2)

[54] *Ante* at 486.

[55] *Ante* at 486.

whether the payroll deduction by a public body constitutes a "contribution" as the MCFA defines that term; and (3) whether public bodies such as school boards, like the Gull Lake Public Schools, have the *authority* to collect and deliver payroll deductions for contributions by members of a union to that union's PAC.

B. EXCLUSIONS TO THE DEFINITION OF EXPENDITURES

I have covered the first issue above. While one might quibble and contend that the Secretary raised this issue in her brief, albeit in a footnote, it is true that she did not raise it in her statement of the issues presented. Nonetheless, the issue is clearly before this Court. One cannot determine that a reimbursement cannot obviate an illegal expenditure without first concluding that there was an illegal expenditure. And one cannot conclude that there was an illegal expenditure without first concluding that there was an expenditure. Since the MCFA clearly excludes the costs for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee from the definition of an expenditure, I believe that this Court must conclude that while the trial court erred in its analysis, it nonetheless reached the right result but for the wrong reasons.[56] On the basis of the plain meaning of the words of the statute, I do not believe that this Court can reverse the trial court on this issue and that the majority's decision to the contrary is clearly wrong.

In a rather colorful footnote, the majority asserts that my dissent turns the MCFA "upside down and inside out."[57] Perhaps the majority has missed my logic

[56] *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

[57] *Ante* at 488 n 5.

here. Putting it simply, and repetitiously, for the cost of collecting and delivering payroll deductions for contributions by members of the MEA affiliate to the MEA-PAC to be an "illegal expenditure" under the MCFA, it must first be an expenditure. But under the definition in § 6(2)(c) of the MCFA,[58] an expenditure does not, among other things, include "[a]n expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee." Thus, the cost of collecting and delivering payroll deductions for contributions by members of the MEA affiliate to the MEA-PAC cannot be an illegal expenditure because it is not an expenditure in the first place. The plain words of the statute are the best indicators of legislative intent. The fact that these plain words lead to a result that I, or the majority, may not like or may consider inconsistent with the general architecture of the MCFA is irrelevant. To me, this is relatively straightforward, and I am at a loss to understand how simply following the explicit language of the definitions contained in the MCFA turns it upside down or inside out, either concurrently or sequentially.

C. CONTRIBUTIONS

It is also correct that no party raised or briefed the question whether the allocated costs of collecting and delivering payroll deductions by members of the MEA affiliate to the MEA-PAC are a contribution to the MEA-PAC by the Gull Lake Public Schools as the MCFA defines contributions and, if so, whether such costs are a prohibited contribution under § 57 of the MCFA. This Court needs to be quite precise on this issue. There is no question that a payroll deduction from an *employee's* salary or wages is a "payment . . . made for the purpose

[58] MCL 169.206(2)(c).

of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question."[59] The fact that such a "contribution" is funneled through a separate segregated fund[60] does not change this conclusion. Separate segregated funds are, after all, in the business of making "contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, political committees, and independent committees."[61]

However, the "contribution" in question here is not the "contribution" of an *employee*. The "contribution" in question, if it is a "contribution" at all, is the allocated costs that a public body *employer*, such as a school district, incurs as a result of collecting and delivering payroll deductions for "contributions" by members of labor organization to a union PAC. One thing, however, is certain: *if* such costs are a "contribution," then § 57 flatly prohibits a public body from making them[62] and there is no exclusion in the definition of "contribution" that would obviate this prohibition.[63]

D. AUTHORIZATION OUTSIDE THE MCFA

I note that there is no authority within the MCFA for public bodies to collect and deliver payroll deductions for contributions by members of a union to that union's PAC. With respect to municipal officers, this Court has held that, as a general rule, " 'they have only such powers as are expressly granted by statute or by sover-

[59] MCL 169.204(1).

[60] MCL 169.255(1).

[61] *Id.*

[62] See MCL 169.257(1).

[63] See MCL 169.204.

eign authority or those which are necessarily to be implied from those granted.' "[64] And the Michigan Supreme Court has stated that "[t]he extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority."[65] As such, "[p]ublic officers have and can exercise only such powers as are conferred on them by law."[66]

The same concepts apply to public bodies. Indeed, one of the central ideas underlying our democracy is that the powers of government are few and defined.[67] "A county is a municipal corporation and possesses only those powers which have been conferred upon it by the Constitution and the statutes."[68] Further, "[n]either the Constitution nor legislative enactment gives authority to a county to expend public funds for the purpose of procuring reapportionment."[69] The power to expend county resources for political purposes could not exist because there was no legal authority granting that power.[70] Similarly, a city may not transfer public funds in order to purchase land for parking lots unless the city charter or other law specifically grants that authority.[71] A public body is therefore necessarily limited in power and must have been granted legal authority to act.

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[64] *Presnell v Wayne Co Bd of Co Rd Comm'rs*, 105 Mich App 362, 368; 306 NW2d 516 (1981), quoting 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 276, p 327.

[65] *Sittler v Bd of Control of the Michigan College of Mining & Technology*, 333 Mich 681, 687; 53 NW2d 681 (1952) (internal quotations and citation omitted).

[66] *Id.* (internal quotations and citation omitted).

[67] See James Madison, Federalist, No. 45.

[68] *Mosier v Wayne Co Bd of Auditors*, 295 Mich 27, 29; 294 NW 85 (1940).

[69] *Id*. at 31.

[70] *Id*.

[71] *McVeigh v City of Jackson*, 335 Mich 391, 398; 56 NW2d 231 (1953).

I do note, however, that MCL 408.477 states:

> Except for those deductions required or expressly permitted by law or by a collective bargaining agreement, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount including an employee contribution to a separate segregated fund established by a corporation or labor organization under section 55 of the Michigan campaign finance act, Act No. 388 of the Public Acts of 1976, being section 169.255 of the Michigan Compiled Laws, without the full, free and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction.

E. ADDITIONAL BRIEFING

The majority does not deal with these issues on the ground that they have not been properly presented before this Court. I disagree.

First, this matter comes to this Court as an appeal from a trial court decision on a declaratory ruling. Accordingly, there are no factual matters in dispute, and, thus, the questions before this Court are purely legal. Second, this Court's review of the trial court's decision is de novo; thus, this Court is in exactly the same position as the trial court when the matter first came to it. Third, I raised each of these issues at oral argument, although I must admit that the responses at that time were less than comprehensive. Fourth, as a matter of judicial economy, avoiding these issues is, to me, a course of action that will lead to both more complexity and more delay. Finally, while this Court does not generally consider issues not set forth in the statement of questions presented, this is not a hard and fast rule, and it is one that this Court should not observe in this instance. Indeed, although this Court "is *obligated* only to review issues that are properly raised and preserved; the court is *empowered*, however, to go

beyond the issues raised and address any issue that, in the court's opinion, justice requires be considered and resolved."[72] "This Court is specifically authorized by MCR 7.216(A)(7) to address issues not expressly raised by the parties when, in this Court's discretion, 'further or different relief' is required."[73]

Thus, rather than avoiding these issues, I would ask the parties to brief them for this Court, so that this Court can decide them in a timely and comprehensive opinion that touches all the bases on these most important questions.

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[72] *Paschke v Retool Industries* (*On Rehearing*), 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994) (emphasis in original) (*Paschke I*).

[73] *Id*. Although our Supreme Court concluded that this Court clearly erred in determining, sua sponte, the merits of that appeal, *Paschke v Retool Industries*, 445 Mich 502, 519; 519 NW2d 441 (1994), the Court did not abrogate this Court's authority "to go beyond the issues raised and address any issue that, in the court's opinion, justice requires be considered and resolved." *Paschke I*, *supra* at 705.

LAFFIN v LAFFIN

Docket No. 277187. Submitted August 5, 2008, at Detroit. Decided August 28, 2008, at 9:10 a.m.

The plaintiff, Louis A. Laffin, and the defendant, Mariza Laffin, were divorced in 1999 pursuant to a consent judgment entered in the Oakland Circuit Court, Gene Schnelz, J. The judgment provided that the plaintiff had paid in advance $62,500 in child support. The parties had agreed that the plaintiff would receive his share of the equity in the marital home awarded to the defendant under an arbitration agreement in the form of the credit toward his future child-support obligation. The consent judgment also provided that any future child-support obligation imposed on the plaintiff after his $62,500 credit had been exhausted would result in a reciprocal alimony obligation imposed on the defendant in the same amount. The friend of the court determined in 2004 that the $62,500 credit had been exhausted and issued an income-withholding order against the plaintiff, requiring him to pay child support in accordance with the Michigan Child Support Formula Manual. The plaintiff moved to terminate that order and to require the defendant to pay alimony in an amount equal to his child-support payments. The defendant responded to the motion, contending that the reciprocal alimony provision was an unenforceable agreement to bargain away the children's right to financial support. The court, Michael Warren, J., granted the plaintiff's motion in an order dated April 28, 2004. The defendant then moved to amend the consent judgment. The court denied the defendant's motion in an order dated May 19, 2004. The case was reassigned to Cheryl A. Matthews, J., and she entered an order on October 12, 2005, denying the defendant's motion for rehearing or reconsideration of the April 28, 2004, and May 19, 2004, orders, and ordering the plaintiff to pay child support and the defendant to pay an equal amount of alimony in return. The Court of Appeals, JANSEN, P.J., and SAAD and DONOFRIO, JJ., denied the defendant's application for leave to appeal in an unpublished order, entered May 26, 2006 (Docket No. 266299). The Supreme Court denied the defendant's application for leave to appeal, 477 Mich 941 (2006), then granted the defendant's motion for reconsideration, vacated its prior order,

and, in lieu of granting leave to appeal, remanded the matter to the Court of Appeals for consideration as on leave granted. 477 Mich 1066 (2007).

The Court of Appeals *held*:

1. The enforcement of the reciprocal alimony provision would deprive the parties' children of the child support they are entitled to by law. The reciprocal alimony provision is void as against public policy.

2. A prearranged alimony provision that becomes effective automatically with the imposition of a child-support obligation, without any regard to the parties' current circumstances or need for spousal support, is inconsistent with the purpose of spousal support and violates the mandate that spousal support may be modified only on the basis of new facts or changed circumstances.

3. The April 28, 2004, order and any other orders that recognize and enforce the reciprocal alimony provision or nullify the plaintiff's obligation to pay child support violate MCL 552.605(2), which requires child support to be determined by application of the child-support formula developed by the friend of the court and provides a procedure for deviating from the formula. The orders entered on April 28, 2004, May 19, 2004, and October 12, 2005, violate MCL 552.605(2). The October 12, 2005, order must be reversed, the April 28, 2004, and May 19, 2004, orders must be vacated, and the matter must be remanded to the trial court for a determination of the plaintiff's appropriate child-support obligation, retroactive to April 28, 2004.

Reversed in part, vacated in part, and remanded.

Mariza Laffin, *in propria persona*.

Before: DAVIS, P.J., and WILDER and BORRELLO, JJ.

WILDER, J. This case is before this Court pursuant to our Supreme Court's order remanding the case to this Court for consideration as on leave granted. *Laffin v Laffin*, 477 Mich 1066 (2007). On appeal, defendant challenges the trial court's October 12, 2005, order denying her motion to set aside prior orders issued in 2004. We reverse the October 12, 2005, order, vacate the trial court's April 28, 2004, and May 19, 2004, orders, and remand for further proceedings.

I

The parties were divorced in 1999. They agreed to binding arbitration to resolve issues of alimony, child support, and property division. Under the arbitration award, defendant received the marital home, subject to a payment of $62,500 to plaintiff, as his share of the equity in the home. Because defendant did not have liquid assets to pay plaintiff for his equity interest in the home, the parties agreed that plaintiff would be granted a credit of $62,500 toward his future child support obligations. When this credit was exhausted, plaintiff would begin paying child support in accordance with the Michigan Child Support Formula Manual (MCSFM). However, the consent judgment that the parties approved, and that was signed by the trial court, did not conform to these requirements. Instead, it provided as follows:

SUPPORT OF MINOR CHILDREN

> IT IS FURTHER ORDERED AND ADJUDGED that support is determined to be $337.00 each week for the three minor children, $269.00 for two minor children, and $175.00 per week when there is one minor child.
>
> IT IS FURTHER ORDERED AND FOUND that Plaintiff has paid in advance to Defendant $62,500.00 for child support, *and that accordingly child support is fully prepaid for as long as same would be payable under Michigan law*.
>
> IT IS FURTHER ORDERED AND ADJUDGED that in the event Defendant should ever seek and obtain child support from Plaintiff that *a sum in the exact amount of the child support awarded shall be paid by Defendant to Plaintiff as alimony*.

* * *

ALIMONY

> IT IS FURTHER ORDERED AND ADJUDGED that neither party hereto is entitled to any alimony and same is forever barred. [Emphasis added.]

In other words, the consent judgment provided that any future child support obligation imposed on plaintiff would result in a reciprocal alimony obligation imposed on defendant in the same amount.

In 2004, the friend of the court determined that plaintiff's $62,500 credit had been exhausted. It issued an income withholding order against plaintiff's income, requiring him to pay child support in accordance with the MCSFM. Plaintiff moved to terminate the income withholding order and require defendant to pay him alimony in an amount equal to his child support payments. Defendant opposed the motion, arguing that the reciprocal alimony provision was the result of plaintiff's fraud, and, in any event, constituted an unenforceable agreement to bargain away the children's right to financial support. The trial court rejected this argument, concluding that defendant was obligated to comply with the reciprocal alimony provision, because she agreed to it, and granted plaintiff's motion in an order dated April 28, 2004. Defendant's motion to amend the consent judgment was subsequently denied by the trial court, in an order dated May 19, 2004. Defendant's motion for reconsideration of that order was also denied. Approximately a year later, the case was reassigned to another judge. Defendant thereafter filed a motion for rehearing or reconsideration of the April 28, 2004, and May 19, 2004, orders, which the trial court denied on October 12, 2005. The trial court also ordered plaintiff to pay child support, and ordered defendant to pay an equal amount of alimony in return.

Defendant filed an application for leave to appeal the October 12, 2005, order, which this Court denied. *Laffin v Laffin*, unpublished order of the Court of Appeals, entered May 26, 2006 (Docket No. 266299). On further appeal, our Supreme Court initially denied defendant's application for leave to appeal, 477 Mich 941 (2006), but then granted a motion for reconsideration, vacated its prior order, and on reconsideration and in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. 477 Mich 1066 (2007).

II

We begin by addressing the underlying question whether the reciprocal alimony provision is void because it violates public policy. This is a question of law, which we review de novo. *Terrien v Zwit*, 467 Mich 56, 61; 648 NW2d 602 (2002).

A consent judgment is in the nature of a contract, and is to be construed and applied as such. *Gramer v Gramer,* 207 Mich App 123, 125; 523 NW2d 861 (1994). If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written, unless the contract is contrary to law or public policy. *Rory v Continental Ins Co,* 473 Mich 457, 468; 703 NW2d 23 (2005). In general, consent judgments are final and binding upon the court and the parties, and cannot be modified absent fraud, mistake, or unconscionable advantage. *Staple v Staple,* 241 Mich App 562, 564; 616 NW2d 219 (2000); *Walker v Walker,* 155 Mich App 405, 406-407; 399 NW2d 541 (1986).

Defendant contends that the reciprocal alimony provision is unenforceable, because it is contrary to the public policy of this state that parents may not bargain

away their children's right to support. She contends that the provision effectively nullifies the children's entitlement to support, by obligating defendant to remit the same amount back to plaintiff, under the guise of alimony. We agree.

It is a well-established principle in Michigan that parties cannot bargain away their children's right to support. *Macomb Co Dep't of Social Services v Westerman*, 250 Mich App 372, 377; 645 NW2d 710 (2002); *Evink v Evink*, 214 Mich App 172, 175-176; 542 NW2d 328 (1995). Consequently, "[a]n agreement by the parties regarding support will not suspend the authority of the court to enter a support order." *Johns v Johns*, 178 Mich App 101, 106; 443 NW2d 446 (1989).

Thus, the provision in the consent judgment, stating that plaintiff's $62,500 credit "fully prepaid" his child support obligation, could not prevent the court from entering a support order. Here, the consent judgment did not preclude the possibility of future child support, but, rather, imposed on defendant a reciprocal obligation to pay plaintiff the same amount in alimony as any child support plaintiff was required to pay. The trial court apparently believed that the parties successfully fashioned an agreement that did not violate public policy, even though it had the practical effect of relieving plaintiff of his future child support obligation.

Although the reciprocal alimony provision is distinct in form from a provision totally precluding child support, it is a distinction without a difference. The purpose and effect of the reciprocal alimony provision are to ensure that the parties and the children remain in the same position financially, regardless of plaintiff's child support obligations. Thus, any amount that plaintiff might be required to remit to defendant and the

children as child support is automatically offset by the payment of a like amount from defendant to plaintiff as alimony.

We conclude that enforcement of this arrangement would deprive the parties' children of the child support they are entitled to by law, and, therefore, the reciprocal alimony provision is void as against public policy, because parties cannot bargain away their children's right to support. *Macomb Co Dep't of Social Services, supra* at 377. Additionally, an alimony obligation that is triggered only by an order of child support, and in an amount equal to the amount of child support, is inconsistent with the purpose of alimony. The main purpose of awarding spousal support is to balance the incomes and needs of the parties, without impoverishing either party. *Moore v Moore,* 242 Mich App 652, 654; 619 NW2d 723 (2000). Spousal support "is to be based on what is just and reasonable under the circumstances of the case." *Id.* See also MCL 552.23(1). Periodic spousal support is subject to modification, on a showing of changed circumstances. *Moore, supra*. Any modification of spousal support must be based on new facts or changed circumstances arising after the judgment of divorce, and requires an evaluation of the circumstances as they exist at the time modification is sought. *Gates v Gates,* 256 Mich App 420, 434; 664 NW2d 231 (2003). By definition, changed circumstances cannot involve facts and circumstances that existed at the time the court originally entered a judgment. *Id.* at 435.

A prearranged reciprocal alimony provision that becomes effective automatically with the imposition of a child support obligation, without any regard to the parties' current circumstances or need for spousal sup-

port, is inconsistent with the purpose of spousal support and violates the mandate that spousal support may be modified only on the basis of new facts or changed circumstances. Here, the reciprocal alimony obligation is not really alimony, but a refund or reimbursement of plaintiff's child support obligation that, both in form and effect, eliminates his child support obligation.

Finally, the trial court's April 28, 2004, order and any other orders that serve to recognize and enforce the reciprocal alimony provision, or nullify plaintiff's obligation to pay child support, also violate MCL 552.605(2). MCL 552.605(2) provides that the court "shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau . . . ." A court may deviate from this formula if it "determines from the facts of the case that application of the child support formula would be unjust or inappropriate" and articulates on the record its reasons for the departure. *Id*. Although MCL 552.605(3) permits the court to enter "a child support order that is agreed to by the parties and that deviates from the child support formula," that subsection further provides that such an order is permissible only "if the requirements of subsection (2) are met." Thus, the trial court must still comply with MCL 552.605(2) and ensure that a child support order is just, even if the parties agree to a support order that deviates from the guidelines. A trial court has discretion to modify a child support order "as the circumstances of the parents and the benefit of the children require," MCL 552.17(1), but a court has a statutory duty to follow the criteria set forth in the MCSFM when modifying a child support award. *Burba v Burba (After Remand),* 461 Mich 637, 643-645, 647; 610 NW2d 873 (2000). Here, the consent judgment also violates the child support statutes, to the extent that it effectively

nullifies plaintiff's child support obligation, contrary to the child support formula, without complying with MCL 552.605(2).

For the foregoing reasons, we conclude that the trial court's orders of April 28, 2004, May 19, 2004, and October 12, 2005, violate the child support statutes, because they permit plaintiff to effectively avoid his child support obligation, as prescribed by the child support formula, without the requisite findings that application of the child support formula would be unjust or inappropriate.

III

Given that we have concluded that the reciprocal alimony provision is void, we now turn to the appropriate scope of relief in light of the unusual procedural history of this case.

Contracts that violate public policy may not be enforced. *Rory, supra* at 491 (unambiguous written contracts are enforced as written, unless a provision violates law or public policy). Accordingly, the trial court's April 28, 2004, order was erroneous because it enforced the reciprocal alimony provision. Further, because the reciprocal alimony provision in the consent judgment is void, the trial court also erred by denying defendant's motion for relief from the consent judgment on May 19, 2004.[1] Thus, even though defendant did not appeal

[1] The trial court also denied defendant's motion for relief from the consent judgment for procedural reasons, because defendant did not cite the court rule under which she was requesting relief. When defendant indicated at the motion hearing that she was requesting relief under MCR 2.612(C), the trial court stated that this was not a case that fell within that rule. We disagree. MCR 2.612(C)(1)(d) and (f) provide that a court may grant relief from a judgment where the judgment is void or for any other reason justifying relief from the operation of the judgment. As

either of these prior orders, these orders have no force or effect because they are unenforceable. *Id*. Under these circumstances, where the trial court failed to set aside a void provision, we conclude that defendant is entitled to relief extending back to April 28, 2004, the date the void order was entered. Accordingly, we reverse the October 12, 2005, order of the trial court, insofar as it recognized and enforced the invalid reciprocal alimony provision. Further, we vacate the April 28, 2004, and May 19, 2004, orders that also recognized and enforced the invalid reciprocal alimony provision, and remand the case to the trial court for a determination of plaintiff's appropriate child support obligation, retroactive to April 28, 2004.

IV

In light of our decision, it is unnecessary to address defendant's remaining issues on appeal.[2]

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explained previously, the reciprocal alimony provision is unenforceable. Because an unenforceable provision is void and is also a reason justifying relief from the operation of a judgment, relief was authorized under MCR 2.612(C)(1)(d) and (f). Furthermore, a motion under subrules d and f need only be made within a reasonable time. Although the motion here was brought approximately five years after the consent judgment was entered, it was not until February 2004 that the friend of the court notified the parties that plaintiff's prepaid child support had been exhausted. Plaintiff's motion to enforce the reciprocal alimony provision was granted shortly thereafter on April 28, 2004, and defendant filed her motion for relief from the consent judgment on May 12, 2004. Defendant's motion was filed within a reasonable time under the circumstances.

[2] We disagree with defendant's argument that the trial court was obligated to refer the dispute in the instant case back to the original arbitrator. The parties' arbitration agreement authorized the arbitrator to decide disputes relating to language to be incorporated into a judgment. It did not authorize the arbitrator to resolve disputes relating to the interpretation of the judgment once a judgment had been entered.

Reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

PEOPLE v ALTHOFF

Docket No. 274906. Submitted March 4, 2008, at Grand Rapids. Decided September 2, 2008, at 9:00 a.m. Leave to appeal sought.

Ryan D. Althoff pleaded guilty in the Berrien Circuit Court to a charge of possession with intent to disseminate obscene material, MCL 752.365. The court, Casper O. Grathwohl, J., ordered the defendant to register as a sex offender pursuant to the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The defendant filed a delayed application for leave to appeal in the Court of Appeals, arguing that he was not required to register under SORA because the offense to which he pleaded guilty was not listed in SORA. The defendant further argued that his case did not fall under SORA's catchall provision because there was no evidence that it involved an offense against a minor. The Court of Appeals remanded the case to the trial court, Charles T. LaSata, J., which determined that the crime at issue did involve an offense against a minor. After the Court of Appeals denied the defendant's application for leave to appeal, the defendant applied for leave to appeal in the Supreme Court, which, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration, as on leave granted, of whether SORA's catchall provision requires that an offender register solely on the basis of the elements of the offense underlying the conviction; whether possessing pornographic photographs constitutes an offense against an individual who is less than 18 years of age, and, if so, what evidentiary standards apply in a hearing to determine whether a defendant must register under SORA; and whether the evidence in this case was sufficient to satisfy the statutory requirement that the individual be less than 18 years of age. 477 Mich 961 (2006).

The Court of Appeals *held*:

1. A court must consider the particular facts of a criminal violation to determine whether the violation by its nature constitutes a sexual offense against an individual who is less than 18 years of age for purposes of SORA. Although the panel that considered this issue in *People v Golba*, 273 Mich App 603 (2007), erred by concluding that it was bound to so hold by *People v Meyers*, 250 Mich App 637 (2002), because the Supreme Court had

determined that portion of *Meyers* to be dictum, *Golba*'s interpretation of SORA's catchall provision is nevertheless binding.

2. The possession of pornographic photographs depicting a child constitutes an offense against an individual who is less than 18 years of age for purposes of SORA's catchall provision because the overarching purpose of SORA is to protect, particularly, the children of this state from the threat of convicted sexual offenders, the Legislature included the possession of child sexually abusive material as a listed offense under SORA, and it is widely accepted that the primary victims of child-pornography possession are the children depicted.

3. A sentencing court may consider all record evidence in determining whether a defendant must register under SORA, as long as the defendant has the opportunity to challenge the relevant factual assertions and any challenged facts are substantiated by a preponderance of the evidence. The court may order the presentment of additional proofs, at a hearing to which the rules of evidence do not apply, if the evidence of record is insufficient to reach a determination. This conclusion does not implicate a defendant's rights to due process and a jury trial because compliance with SORA is not a punishment.

4. The prosecution demonstrated by a preponderance of the evidence that the photographs for which the defendant was convicted depicted individuals less than 18 years of age. Although the detective who testified regarding this issue had no specialized training in identifying a person's age, he did have experience in investigating child pornography, and expert testimony is not required to establish the age of children in images.

Affirmed.

1. CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — LISTED OFFENSES — CATCHALL PROVISION.

A court must consider the particular facts of a criminal violation to determine whether the violation by its nature constitutes a sexual offense against an individual who is less than 18 years of age for purposes of the Sex Offenders Registration Act (MCL 28.722[e][*xi*]).

2. CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — LISTED OFFENSES — CATCHALL PROVISION — POSSESSION OF CHILD SEXUALLY ABUSIVE MATERIAL.

The possession of pornographic photographs of a child constitutes an offense against an individual who is less than 18 years of age for purposes of the Sex Offenders Registration Act (MCL 752.365; MCL 28.722[e][*xi*]).

3. SENTENCES — SEX OFFENDERS REGISTRATION ACT — EVIDENCE.

A sentencing court may consider all record evidence when determining whether a defendant must register under the Sex Offenders Registration Act as long as the defendant has the opportunity to challenge relevant factual assertions and any challenged facts are substantiated by a preponderance of the evidence (MCL 28.721 *et seq*.).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Arthur J. Cotter*, Prosecuting Attorney, and *Aaron J. Mead*, Assistant Prosecuting Attorney, for the people.

Gentry Law Offices, P.C. (by *Kevin S. Gentry*), for the defendant.

Before: FITZGERALD, P.J., and SMOLENSKI and BECKERING, JJ.

PER CURIAM. Defendant Ryan Derrek Althoff pleaded guilty of possession with intent to disseminate obscene material, MCL 752.365. He subsequently appealed the December 22, 2004, trial court order requiring him to register as a sex offender pursuant to the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. This Court denied defendant's delayed application for leave to appeal. In lieu of granting leave to appeal, our Supreme Court remanded the case to this Court for consideration as on leave granted. We affirm.

I

Defendant and his wife, Elizabeth Althoff, formerly resided in Bridgman, Michigan. In January 2003, the state police responded to a report of a domestic dispute at the couple's home. During the investigation, Elizabeth informed Trooper Matthew Waters that defendant had been viewing child pornography and gave the

trooper several computer discs. Thereafter, defendant joined the United States Army. In the fall of 2004, while defendant was stationed in Germany, police contacted him several times regarding the computer discs seized from his Bridgman home. Defendant was subsequently charged with possession of child sexually abusive material, MCL 750.145c(4), on the basis of the content of the computer discs. In December 2004, defendant pleaded guilty to the reduced charge of possession with intent to disseminate obscene material, MCL 752.365. Defendant admitted that he had downloaded pornographic material and that he planned to show the material to a friend. At sentencing, the trial court ordered defendant to pay fines, costs, and fees, and to register pursuant to SORA.[1]

In September 2005, defendant filed a delayed application for leave to appeal the trial court's December 22, 2004, judgment of sentence. Specifically, defendant argued that the trial court erred by ordering him to register pursuant to SORA when he pleaded guilty to an offense that was not listed under SORA and there was no evidence that this case involved an offense against a minor. This Court held the matter in abeyance and remanded the case "to the sentencing court for a factual finding whether defendant was convicted of a sexual offense against an individual who is less than 18 years of age." *People v Althoff*, unpublished order of the Court of Appeals, entered November 23, 2005 (Docket No. 264980).

The trial court conducted an evidentiary hearing on December 13, 2005, pursuant to this Court's order. Detective Douglas Kill testified that he had viewed the

[1] The court declined to order any jail time in light of the fact that defendant had already served time in the custody of the United States Army.

contents of the computer discs seized from defendant's home and that there were photographs of young, nude females on several of the discs. According to Detective Kill, one of the females appeared to be 13 or 14 years old, and another appeared to be 16 years old. In one photograph, these two females were standing on a Jacuzzi tub nude. One of the females was holding an extendable showerhead. Other photographs depicted the younger of the two females standing in a hallway and sitting in a chair nude. Detective Kill admitted that he did not have any specialized training in identifying a person's age. He testified, however, that the two females did not appear to be fully developed physically and that he had investigated similar child pornography cases in the past. The computer discs at issue and printed copies of the photographs on the discs were mistakenly lost or destroyed after the sentencing and were unavailable at the evidentiary hearing.

On the basis of Detective Kill's testimony, the trial court determined that defendant was convicted of a sexual offense against an individual less than 18 years of age and, therefore, that he was required to register pursuant to SORA. The trial court effectuated its ruling in an order dated December 20, 2005. Thereafter, this Court denied defendant's delayed application for leave to appeal for lack of merit in the grounds presented. *People v Althoff*, unpublished order of the Court of Appeals, entered March 3, 2006 (Docket No. 264980).

Defendant subsequently applied for leave to appeal this Court's March 3, 2006, order. On December 8, 2006, in lieu of granting leave to appeal, our Supreme Court remanded the case to this Court for consideration as on leave granted of four issues:

> (1) whether MCL 28.722(e)(xi) requires registration of an offender based solely on the legal elements of the offense

> for which he stands convicted, or whether the facts of the particular offense are to be considered in determining if the offense "by its nature constitutes a sexual offense against an individual who is less than 18 years of age" cf. *People v Meyers*, 250 Mich App 637 [649 NW2d 123] (2002) (dictum); (2) whether the possession of pornographic photographs constitutes an offense "against" an individual who is less than 18 years of age; (3) if possession is an offense "against" an individual, what evidentiary standards apply to a hearing held to determine if a defendant must register under the Sex Offender[s] Registration Act; and (4) whether the evidence in this case was sufficient to satisfy the statutory requirement that the individual be "less than 18 years of age." [*People v Althoff*, 477 Mich 961 (2006).]

II

Pursuant to the Supreme Court's order in this case, we must first consider

> whether MCL 28.722(e)(xi) requires registration of an offender based solely on the legal elements of the offense for which he stands convicted, or whether the facts of the particular offense are to be considered in determining if the offense "by its nature constitutes a sexual offense against an individual who is less than 18 years of age[.]" [*Althoff, supra* at 961.]

The construction and application of SORA presents a question of law that we review de novo on appeal. *People v Golba*, 273 Mich App 603, 605; 729 NW2d 916 (2007).

"SORA requires an individual who is convicted of a listed offense after October 1, 1995, to register as a sex offender." *Id*., citing MCL 28.723(1)(a). The definition of "listed offense" in MCL 28.722(e) includes a catchall provision, MCL 28.722(e)(*xi*), which states that "[a]ny other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years

of age" constitutes a listed offense.[2] The Code of Criminal Procedure provides clarification of this catchall provision, stating in relevant part:

> If the defendant is sentenced for an offense other than a listed offense as defined in section 2(d)(i) to (*ix*) and (*xi*) to (*xiii*) of the sex offenders registration act, 1994 PA 295, MCL 28.722, the court shall determine if the offense is a violation of a law of this state or a local ordinance of a municipality of this state that by its nature constitutes a sexual offense against an individual who is less than 18 years of age. If so, the conviction is for a listed offense as defined in section 2(d)(*x*)[3] of the sex offenders registration act, 1994 PA 295, MCL 28.722, and the court shall include the basis for that determination on the record and include the determination in the judgment of sentence. [MCL 769.1(13).]

In *Meyers*, this Court found that the defendant was required to register as a sex offender pursuant to former MCL 28.722(d)(*i*) and (*xii*), now subsections e(*i*) and (*xiii*). *Meyers, supra* at 645. The *Meyers* Court also addressed SORA's catchall provision. The Court determined that pursuant to SORA's use of the term "convictions" and the plain language of the catchall provision, a defendant must register as a sex offender under the provision when three conditions exist simultaneously:

> First, the defendant must have been convicted of a state law violation or a municipal ordinance violation. Second, the state law or municipal ordinance violation must, "by its nature," constitute a "sexual offense." Third, the victim of the state law or municipal ordinance violation must be under eighteen years of age. [*Id*. at 647.]

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[2] MCL 28.722(e) was previously denominated MCL 28.722(d), and the catchall provision was found in MCL 28.722(d)(*x*). *Golba*, *supra* at 605-606 nn 1-2.

[3] MCL 28.722(d)(*x*), now MCL 28.722(e)(*xi*). See n 2 of this opinion.

The *Meyers* Court concluded that the defendant's offense satisfied all three elements of what is now MCL 28.722(e)(*xi*). *Meyers, supra* at 650. It was undisputed that the defendant had been convicted of a state-law violation, using the Internet in an attempt to commit conduct proscribed under MCL 750.145a, which violated MCL 750.145d(1)(b). *Meyers, supra* at 638, 647. In regard to the second and third elements, the Court considered the underlying facts of the offense, particularly that the defendant had engaged in an online discussion about oral sex with a person he believed to be a 12-year-old girl, in hopes of obtaining oral sex from the girl. *Id*. at 638-639, 648-650. In reality, the defendant was conversing with a police detective. *Id*. at 639. The Court acknowledged that "[t]here may be other cases in which a defendant convicted of violating MCL 750.145d need *not* register under SORA because the victim was over the age of eighteen or the offense was not inherently sexual," and that "[o]nly after analyzing the facts of the specific case is it possible to determine whether a defendant is subject to SORA's registration requirement" under MCL 28.722(e)(*xi*). *Meyers, supra* at 650. In its December 8, 2006, order in this case, the Supreme Court labeled the portion of the *Meyers* opinion requiring consideration of the facts of the specific offense "dictum." *Althoff*, *supra* at 961.

After the Supreme Court issued its December 8, 2006, order, this Court addressed the application of SORA's catchall provision in *Golba*. In that case, the defendant was charged with possession of child sexually abusive material, MCL 750.145c(4), and unauthorized access to computers, MCL 752.795. *Golba*, *supra* at 605. A jury subsequently convicted the defendant of the latter offense and the trial court ordered him to register as a sex offender pursuant to MCL 28.722(e)(*xi*). *Golba*, *supra* at 605-606. The defendant appealed the trial

court's order, arguing that his violation of MCL 752.795 did not " 'by its nature constitute[] a sexual offense against an individual who is less than 18 years of age.' " *Golba*, *supra* at 605, quoting MCL 28.722(e)(*xi*).

On appeal, the *Golba* Court followed the *Meyers* Court's interpretation of MCL 28.722(e)(*xi*), stating that the catchall provision requires the simultaneous existence of three conditions: "(1) the defendant must have been convicted of a state-law violation or a municipal-ordinance violation, (2) the violation must, 'by its nature,' constitute a 'sexual offense,' and (3) the victim of the violation must be under 18 years of age." *Golba*, *supra* at 607, citing *Meyers, supra* at 647. In *Golba*, there was no dispute that the defendant was convicted of the state-law violation of unauthorized access to computers, MCL 752.795, as the first element requires.

In regard to the second element, the *Golba* Court again followed the *Meyers* Court's reasoning. Quoting *Meyers*, the *Golba* Court stated that " '[t]here can be no debate that conduct violating a state criminal law or municipal ordinance that has inherent qualities pertaining to or involving sex fits this second element.' " *Golba*, *supra* at 608, quoting *Meyers*, *supra* at 647-648. The Court further stated that, "[a]s in *Meyers*, we recognize that conduct that is nonsexual in nature may violate MCL 752.795," but that it was bound to follow the "*Meyers* holding that whether an offense is 'by its nature . . . a sexual offense' within the meaning of MCL 28.722(e)(*xi*) depends on the defendant's conduct that formed the basis for the conviction, regardless of the fact that the statute could be applied to nonsexual behavior in other circumstances." *Golba*, *supra* at 610-611, citing *Meyers*, *supra* at 648-649.

The *Golba* Court found support for the *Meyers* holding in the Code of Criminal Procedure, which provides that the sentencing court "shall determine if the offense is a violation of a law of this state or a local ordinance of a municipality of this state that by its nature constitutes a sexual offense against an individual who is less than 18 years of age" pursuant to MCL 28.722(e)(*xi*), and, if so, "include the basis for that determination on the record and include the determination in the judgment of sentence." MCL 769.1(13). The Court reasoned that "[i]f the sentencing court's 'determination' could be made as a matter of law only from the language of the criminal statute at issue, there would be little reason for including the requirement that the sentencing court 'include the basis for that determination on the record,' " and, therefore, that the Legislature must have "intended sentencing courts to make findings of fact regarding the underlying conduct in individual cases to support the determination that the offense 'by its nature constitutes a sexual offense against an individual who is less than 18 years of age.' " *Golba*, *supra* at 611, quoting MCL 769.1(13) and MCL 28.722(e)(*xi*). On the basis of the foregoing, the *Golba* Court concluded that it "agree[d] with *Myers* [sic] that the underlying factual basis for a conviction governs whether the offense 'by its nature constitutes a sexual offense against an individual who is less than 18 years of age.' " *Golba*, *supra* at 611, quoting MCL 28.722(e)(*xi*).

The *Golba* Court concluded that under the particular facts of that case, the defendant's violation of MCL 752.795 satisfied the second element of MCL 28.722(e)(*xi*). *Golba*, *supra* at 611-612. The evidence presented at trial established that the defendant had downloaded pornography on a school computer, viewed the pornography on the computer in the presence of a

16-year-old female student, and used the computer to send the student sexually explicit e-mails and solicit sex from her, all in violation of the school's acceptable use policy. *Id*. Additionally, the Court concluded that "the trial court did not clearly err in finding that the victim of defendant's conduct in violating MCL 752.795 was 'an individual who is less than 18 years of age,' " as required by the third element of MCL 28.722(e)(*xi*). *Golba*, *supra* at 612. The undisputed evidence in the case established that the victim of the offense was the 16-year-old female student. *Id*. at 612-613. The Court noted that whether an offense satisfies the three elements of MCL 28.722(e)(*xi*) is primarily a question of fact for the trial court and, considering the evidence presented, the trial court did not err by ordering the defendant to comply with SORA. *Id*. at 613.

In light of our Supreme Court's December 8, 2006, order in this case, the *Golba* Court erroneously stated that it was *bound* to follow the "*Meyers* holding that whether an offense is 'by its nature . . . a sexual offense' within the meaning of MCL 28.722(e)(*xi*) depends on the defendant's conduct that formed the basis for the conviction . . . ." *Golba*, *supra* at 610-611, citing *Meyers*, *supra* at 648-649. In its order, the Supreme Court labeled that portion of the *Meyers* opinion "dictum," and dictum is not binding on this Court. *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 557-558; 741 NW2d 549 (2007). We are, however, bound by this Court's interpretation of MCL 28.722(e)(*xi*) in *Golba*. See MCR 7.215(J)(1). Therefore, pursuant to this Court's holding in *Golba*, we conclude that the particular facts of a violation are to be considered in determining whether the violation "by its nature constitutes a sexual offense against an individual who is less than 18 years of age" under MCL 28.722(e)(*xi*).

III

Next, we must consider "whether the possession of pornographic photographs constitutes an offense 'against' an individual who is less than 18 years of age" for purposes of MCL 28.722(e)(*xi*). *Althoff*, *supra* at 961.

The primary goal of statutory interpretation is to determine and give effect to the intent of the Legislature in enacting the provision. *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996). "Statutory language should be construed reasonably, keeping in mind the purpose of the statute." *Id*. When determining legislative intent, this Court must first consider the specific language of the statute. *Id*. Every word or phrase of a statute should be accorded its plain and ordinary meaning, but, if the legislative intent cannot be determined from the statute itself, dictionary definitions may be consulted. *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007). Provisions must be read in the context of the entire statute in order to produce a harmonious whole. *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 52; 731 NW2d 94 (2006).

According to MCL 28.721a, SORA was enacted to assist law enforcement officers and the people of Michigan in preventing "future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by [SORA] poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." SORA's registration requirements are intended to provide "an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger." MCL 28.721a.

As explained earlier, SORA requires an individual convicted of a listed offense to register as a sex offender.

Golba, *supra* at 605, citing MCL 28.723(1)(a). SORA's catchall provision provides that "[a]ny other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense *against* an individual who is less than 18 years of age" constitutes a listed offense. MCL 28.722(e)(*xi*) (emphasis added). The term "against" is not defined in the statute, but is generally defined as "in opposition or hostility to." *Merriam-Webster's Collegiate Dictionary* (2007). In construing and applying MCL 28.722(e)(*xi*), this Court has determined that the provision requires the simultaneous existence of three conditions, including that the offense be against an individual less than 18 years of age, or, in other words, that "the victim of the violation . . . be under 18 years of age." See *Golba*, *supra* at 607.

Defendant makes much of the fact that the language in MCL 28.722(e)(*xi*) requiring the offense to be "against an individual who is less than 18 years of age" differs from the language in other listed offenses requiring that "a victim [be] an individual less than 18 years of age." See MCL 28.722(e)(*ii*), (*v*), (*vi*), and (*viii*). Defendant argues that this difference "must mean something," although he does not specifically state what it must mean. Defendant simply asserts that the phrase "offense against an individual" in MCL 28.722(e)(*xi*) is "less inclusive" than the phrase "if a victim is an individual" in the other listed offenses. We disagree. The general definition of the term "against" is broad, and indicates that, under MCL 28.722(e)(*xi*), the offense must be "in opposition or hostility to" the individual. We find the term "against" to be no less inclusive than the term "victim," which is defined as a "person harmed by a crime, tort, or other wrong" in Black's Law Dictionary (8th ed), or as a person who "is acted on and usually adversely affected by a force or

agent" in *Merriam-Webster's Collegiate Dictionary* (2007). Furthermore, as indicated earlier, this Court has already interpreted the language in MCL 28.722(e)(*xi*) to mean that "the victim of the violation must be under 18 years of age." See *Golba*, *supra* at 607.

That said, the Legislature's inclusion of MCL 750.145c as a listed offense requiring registration as a sex offender indicates that the possession of child pornography constitutes an offense against an individual less than 18 years of age, or, in other words, that the child depicted in the pornography is a victim of the offense. MCL 28.722(e)(*i*). MCL 750.145c, under which defendant was initially charged, prohibits engaging a child in sexually abusive activity, distributing or promoting child sexually abusive activity or material, and possessing child sexually abusive material. This Court has held that MCL 750.145c "focuses on protecting children from sexual exploitation, assaultive or otherwise. The purpose of the statute is to combat the use of children in pornographic movies and photographs, and to prohibit the production and distribution of child pornography." *People v Ward*, 206 Mich App 38, 42-43; 520 NW2d 363 (1994).

In *People v Riggs*, 237 Mich App 584, 586; 604 NW2d 68 (1999), the defendant was charged with four counts of child sexually abusive activity, MCL 750.145c(2), on the basis of the photographing and videotaping of four young girls. The trial court subsequently granted the defendant's motion to quash, finding no evidence that the girls were engaged in "child sexually abusive activity" as defined by MCL 750.145c(1)(h) at the time they were photographed and videotaped. *Id*. This Court reversed in part, concluding that the plain language of the statute "prohibits the making of a visual image that is a likeness or representation of a child engaging in one

of the listed sexual acts," regardless of whether the child actually engaged in sexual activity. *Id*. at 590-591. Citing *Ward*, the *Riggs* Court explained:

> Our interpretation of the plain language of the statute is consistent with the intent of the Legislature. . . . Misappropriating the innocent image of a child for purposes of creating the appearance of a child engaging in a listed sexual act while different in kind from the damage that arises from actually subjecting a child to the actual act is nonetheless exploitative and, arguably, equally as damaging. A child whose innocuous image has been altered to create sexually explicit pictures has its innocence violated. Moreover, ordinary nudity that has been enhanced to depict something lewd and preserved on tape has the potential of being a source of great humiliation, embarrassment, and mental and emotional distress to the child who may be unable to appreciate her innocent role in the creation and only able to focus on the end product. [*Riggs*, *supra* at 591.]

Similarly, the United States Supreme Court opined that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. *New York v Ferber*, 458 US 747, 758; 102 S Ct 3348; 73 L Ed 2d 1113 (1982). The *Ferber* Court noted that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *Id.* at 759. The Fifth Circuit Court of Appeals opined that "the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials." *United States v Norris*, 159 F3d 926, 930 (CA 5, 1998). Indeed, one of the reasons for criminalizing the possession of child pornography is to create an incentive for the possessor to destroy the material, thereby alleviating some of the harm to the children depicted. *United States v Sherman*, 268 F3d

539, 547 (CA 7, 2001), citing *Osborne v Ohio*, 495 US 103, 111; 110 S Ct 1691; 109 L Ed 2d 98 (1990).

Significantly, at least seven federal circuits confronted with the issue have concluded that the primary victims of possessing, receiving, transporting, distributing, shipping, and reproducing child pornography are the children depicted. See *United States v Shutic*, 274 F3d 1123, 1126 (CA 7, 2001), citing *United States v Tillmon*, 195 F3d 640, 644 (CA 11, 1999) (the primary victim of transporting and distributing child pornography is the child portrayed); *Norris, supra* at 929 (the primary victim of receiving child pornography is the child portrayed); *United States v Hibbler*, 159 F3d 233, 237 (CA 6, 1998) (the primary victim of possessing and distributing child pornography is the child portrayed); *United States v Boos*, 127 F3d 1207, 1213 (CA 9, 1997) (the primary victim of distributing child pornography is the child depicted); *United States v Ketcham*, 80 F3d 789, 793 (CA 3, 1996) (the primary victim of receiving, transporting, distributing, and recording child pornography is the child portrayed); *United States v Rugh*, 968 F2d 750, 756 (CA 8, 1992) (the primary victim of receiving child pornography is the child depicted). Only the Fourth Circuit has concluded that society in general is the primary victim of child pornography and that the children depicted are secondary victims. *United States v Toler*, 901 F2d 399, 403 (CA 4, 1990).

In light of the overarching purpose of SORA to protect the people, and particularly the children, of this state from the threat of convicted sexual offenders, the Legislature's inclusion of MCL 750.145c, which prohibits the possession of child sexually abusive material as a listed offense under SORA, and the widely accepted determination that the primary victims of child pornography possession are the children depicted, we hold that

"the possession of pornographic photographs [depicting a child] constitutes an offense 'against' an individual who is less than 18 years of age" for purposes of MCL 28.722(e)(*xi*). *Althoff*, *supra* at 961.

IV

Because we have concluded that the possession of pornographic photographs is an offense against an individual, we must consider "what evidentiary standards apply to a hearing held to determine if a defendant must register under [SORA.]" *Althoff, supra* at 961.

In general, " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " *Golba*, *supra* at 615, quoting *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296, 301; 124 S Ct 2531; 159 L Ed 2d 403 (2004). The defendant in *Golba* argued on appeal that "by ordering him to register under SORA, the trial court impermissibly violated his Fifth Amendment right to due process of law and his Sixth Amendment right to a jury trial, as enforced against states by the Fourteenth Amendment." *Golba*, *supra* at 615. In so arguing, the defendant relied on the United States Supreme Court cases enforcing those constitutional rights, *Apprendi* and *Blakely*. *Id*. The *Golba* Court held, however, that compliance with SORA is not a punishment. *Id.* at 616, 620. "Rather, SORA is a remedial regulatory scheme furthering a legitimate state interest of protecting the public." *Id*. at 620. Accordingly, the Court held that judicial fact-finding in applying SORA does not violate the *Apprendi-Blakely* rule. *Id*. at 616, 620.

The *Golba* Court further held that, in applying SORA, the sentencing court "may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence." *Id*. at 614. The sentencing court may also consider evidence admitted during trial. *Id*. This Court reached a similar conclusion in *People v Ratkov (After Remand)*, 201 Mich App 123; 505 NW2d 886 (1993), regarding calculations under the sentencing guidelines. The *Ratkov* Court held that a "sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *Id*. at 125. The Court continued:

> The contents of the presentence report are presumptively accurate if unchallenged by the defendant. However, once a defendant has effectively challenged an adverse factual assertion contained in the presentence report or any other controverted issues of fact relevant to the sentencing decision, the prosecution must prove by a preponderance of the evidence that the facts are as asserted. If the record provides insufficient evidence upon which to base the decision supporting or opposing the scoring, the court in its discretion may order the presentment of further proofs. This Court will affirm a sentencing court's scoring decision where there is evidence existing to support the score. [*Id*. at 125-126 (citations omitted).]

Considering this Court's previous holdings in *Ratkov* and *Golba*, we conclude that a sentencing court may consider all record evidence in determining if a defendant must register under SORA, as long as the defendant has the opportunity to challenge relevant factual

assertions and any challenged facts are substantiated by a preponderance of the evidence. The court may order the presentment of additional proofs if the evidence of record is insufficient to reach a determination. Pursuant to MRE 1101(b)(3), the rules of evidence would not apply to a hearing held to determine if a defendant must register under SORA.

V

Finally, we must consider whether the evidence in this case was sufficient to satisfy the requirement under MCL 28.722(e)(*xi*) that the victim of the offense be "less than 18 years of age." *Althoff*, *supra* at 961. Defendant does not dispute that he was convicted of the state-law violation of possession with intent to disseminate obscene material, MCL 752.365, and the evidence in this case demonstrates that the violation "by its nature constitutes a sexual offense." Defendant argues, however, that there is insufficient evidence to find that the victims of the offense were minors. We disagree.

The trial court's determination that defendant committed a sexual offense against individuals "less than 18 years of age" was primarily a finding of fact. *Golba*, *supra* at 613, citing MCL 769.1(13). "We review underlying factual findings of the trial court at sentencing for clear error." *Golba*, *supra* at 613, citing MCR 2.613(C) and *People v Witherspoon*, 257 Mich App 329, 335 n 1; 670 NW2d 434 (2003). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

As explained earlier, in determining whether the victim of the offense is under the age of 18, the sentencing court may consider all record evidence, including the content of presentence investigation re-

ports (PSIRs), testimony taken at evidentiary hearings, and even acquittals, as long as any challenged facts are substantiated by a preponderance of the evidence. See *Golba*, *supra* at 614; *Ratkov*, *supra* at 125. In this case, defendant was charged with possession of child sexually abusive material, MCL 750.145c(4), although he ultimately pleaded guilty of a lesser offense. At sentencing, defendant's probation officer provided an oral PSIR and repeatedly stated that defendant had viewed pornography involving children. Defendant did not object to these statements. Later, at the December 13, 2005, evidentiary hearing, Trooper Waters testified that when he responded to the reported domestic dispute at defendant's home, Elizabeth stated that defendant had been viewing child pornography. Elizabeth gave the trooper several computer discs at that time. Detective Kill testified that he personally reviewed the contents of the discs and found photographs of young, nude females on several of them. According to his testimony, one of the females appeared to be 13 or 14 years old, and another appeared to be 16 years old. While the detective admitted that he did not have any specialized training in identifying a person's age, such as identifying "a 13-year-old, as opposed to . . . an 18-year-old," he testified that the two females in the photographs did not appear to be fully developed physically and that he had investigated similar child pornography cases in the past.

Considering the evidence of record, particularly Detective Kill's testimony describing the physical appearance of the females in the photographs and his previous experience investigating child pornography cases, the trial court did not clearly err in finding that the victims in this case were under the age of 18. Contrary to defendant's argument on appeal, expert testimony is not required to establish the age of children in images; rather, expert testimony is *permissible* if age is not

otherwise proven. See *People v Girard*, 269 Mich App 15, 22; 709 NW2d 229 (2005), citing MCL 750.145c(5). The prosecution demonstrated by a preponderance of the evidence that defendant committed a sexual offense against individuals "less than 18 years of age." Therefore, because defendant's violation satisfies the three elements of MCL 28.722(e)(*xi*), the trial court did not err in requiring him to register as a sex offender under SORA.

Affirmed.

HERNANDEZ v FORD MOTOR COMPANY

Docket No. 277811. Submitted August 12, 2008, at Detroit. Decided September 2, 2008, at 9:05 a.m. Leave to appeal sought.

Maria Del Socorro Herrera Hernandez, as personal representative of the estate of Jose Francisco Martinez Villalon, deceased, brought an action in the Wayne Circuit Court against the Ford Motor Company, seeking damages related to the decedent's death in an automobile accident that occurred in Mexico while the decedent was a passenger in a vehicle manufactured by Ford in Missouri and allegedly designed in Michigan. The plaintiff is a Mexican citizen, as was the decedent, her husband. The vehicle was purchased in Mexico and remains there, available for inspection. Ford moved to dismiss the complaint on the basis of forum non conveniens, alleging that the action should be brought in Mexico. Ford stipulated that it would submit to the jurisdiction of the Mexican courts, abide by their rulings, and pay any final judgment. The court, Cynthia D. Stephens, J., entered an order denying Ford's motion. The Court of Appeals, WHITE, P.J., and TALBOT and KELLY, JJ., held Ford's application for leave to appeal in abeyance pending the Supreme Court's decision in *Radeljak v DaimlerChrysler Corp*, 472 Mich 924 (2005), and granted Ford's motion for a stay. Unpublished order of the Court of Appeals, entered December 5, 2005 (Docket No. 264910). After the Supreme Court decided *Radeljak*, 475 Mich 598 (2006), the Court of Appeals, WHITE, P.J., and TALBOT and KELLY, JJ., in an unpublished order, entered August 2, 2006 (Docket No. 264910), in lieu of granting the application, vacated the trial court's order that denied the motion to dismiss and ordered the trial court to provide on remand an expanded analysis that addresses the competing arguments of the expert witnesses, taking into account *Juanes v Continental Tire North America, Inc*, an unpublished memorandum opinion of the United States District Court for the Southern District of Illinois, issued September 26, 2005 (Docket No. 05-4015-JLF), 2005 WL 2347218, and reconsidering all the factors for determining a forum non conveniens question listed in *Cray v Gen Motors Corp*, 389 Mich 382 (1973), in light of the Supreme Court's decision in *Radeljak*. The Court of Appeals also vacated the stay that it had imposed. On remand, the trial court again determined that the

case should not be dismissed on the basis of forum non conveniens. The Court of Appeals, ZAHRA, P.J., and WHITE and WILDER, JJ., granted Ford's delayed application for leave to appeal in an unpublished order, entered September 6, 2007 (Docket No. 277811).

The Court of Appeals *held*:

1. A plaintiff can successfully bring a cause of action in Mexico by complying with the applicable procedural rules. Although territorial jurisdiction in Mexico generally requires that a defendant be domiciled within the court's jurisdictional territory, such jurisdiction may be waived or extended when a defendant is outside the court's territorial competence and there is a point of contact within the forum. Mexico appears to be an available forum to hear this case if Ford agrees to submit to jurisdiction in Mexico. The trial court abused its discretion in deciding that Mexico was not an available forum for this action.

2. Although the trial court considered each of the *Cray* factors, it did not also consider the effect of the *Radeljak* decision, in which the Supreme Court stated that dismissal may be warranted if a plaintiff chooses a particular forum solely to take advantage of the forum's more favorable law rather than because it was convenient, determined that a foreign plaintiff's choice of forum should be given less deference than would be accorded to a domestic plaintiff, and concluded that a court has the discretion to refuse to hear a case even if the Michigan court was not seriously inconvenient.

3. Four of the *Cray* factors relating to the private interest of the litigant are neutral and three of the factors favor a Mexican forum. The private interest factors favor dismissal in the Michigan forum.

4. All three of the *Cray* factors relating to matters of public interest favor a Mexican forum.

5. The *Cray* factor concerning the promptness in raising the plea of forum non conveniens is neutral.

6. A balancing and weighing of the *Cray* factors shows that Mexico is the more appropriate forum. Because Mexico is an available forum and the *Cray* factors favor Mexico, the trial court's decision was not within the principled range of outcomes. The trial court abused its discretion by denying Ford's motion to dismiss on the basis of forum non conveniens. The trial court's order must be reversed and the matter must be remanded for the entry of an order dismissing the plaintiff's cause of action.

Reversed and remanded.

Michael Langnas and *Merritt & Associates, P.C.* (by *John M. Merritt*), for the plaintiff.

Bowman and Brooke LLP (by *Norma M. Gant*, *Jeffrey T. Gorcyca*, and *Dana M. Hathaway*) (*Craig A. Morgan*, of counsel) for the defendant.

Before: MURRAY, P.J., and WHITBECK and TALBOT, JJ.

PER CURIAM. This product liability action brought by the plaintiff, Maria Del Socorro Herrera Hernandez, as personal representative of the estate of Jose Francisco Martinez Villalon, deceased, arises from an October 5, 2002, rollover automobile accident in Tabasco, Mexico, involving a 1996 Ford Explorer. The decedent, plaintiff's husband, was fatally injured in the accident. The trial court denied defendant Ford Motor Company's (Ford) motion to dismiss on the basis of forum non conveniens. Ford filed an interlocutory application for leave to appeal that order, and this Court, in lieu of granting the application, vacated the order and remanded for further proceedings. On remand, the trial court again denied Ford's motion to dismiss on the basis of forum non conveniens. Ford now appeals by delayed leave granted, and we reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff is a Mexican citizen, as was her husband. According to a police report, the accident at issue was a single-vehicle accident, in which the driver of the Explorer was driving above the speed limit without a driver's license. Villalon was a passenger in the Explorer and died as a result of the accident. The Explorer was manufactured in a plant in Missouri and was allegedly designed in Michigan. Hernandez indicates

that the Explorer was sold in Mexico and remains in Mexico, available for inspection.

Ford moved to dismiss Hernandez's complaint on the basis of forum non conveniens. Hernandez and Ford each presented affidavits from experts on Mexican law, who differed on whether Mexico was an available alternative forum.

Hernandez's expert, Leonel Pereznieto-Castro, submitted a declaration explaining that there were different evidentiary and legal standards in Mexico, long delays of at least two or three years, and no contingency fees. Pereznieto-Castro explained that the defendant's domicile was usually the appropriate forum under Mexican law and that he believed the appropriate forum in this case was the United States, where the product was designed and manufactured. He further alleged that Mexican courts would refuse jurisdiction in a case against a defendant who was not domiciled in Mexico. Pereznieto-Castro averred that, after *Garcia v Ford Motor Co*[1] and *Torres v Ford Motor Co*[2] were dismissed by courts in the United States because of forum non conveniens, they were refiled in Mexico but dismissed by the Mexican courts for lack of jurisdiction, even though the Mexican courts were aware that Ford had consented to their jurisdiction. Pereznieto-Castro also explained that damages awards were not as good in Mexico as in the United States, that there was no strict liability under Mexican law, and that there was a higher standard for recovery in Mexico.

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[1] *Garcia v Ford Motor Co*, unpublished memorandum opinion of the United States District Court for the Eastern District of Missouri, issued July 7, 2003 (Docket No. 4:02CV001319 RWS).

[2] *Torres v Ford Motor Co*, Civil Court in the District of Leon, Guanajuato, Mexico, Case No. 648/04-C (November 16, 2004), aff'd on appeal in the Supreme Court, Guanajuato, Mexico (January 31, 2005).

Ford's expert, Roberto S. Genis Gonzales Mendez, averred that Mexico's legal system is "equal to that of most developed countries," and that it provides due process and free access. Genis Gonzales Mendez averred that Hernandez had several available options under Mexican law and that the case would be resolved in 16 months to two years.

Ford acknowledged that under Mexican law a foreign defendant must submit to the jurisdiction of both the Mexican court and a specific Mexican judge in order to consent to jurisdiction. Ford submitted an affidavit from Professor Jose Maria Serna de la Garza, who explained that, in *Garcia*, Ford was never given notice of the filing of the case in Mexico and, therefore, did not submit to the jurisdiction of a specific judge, and that if it had so submitted, the case would have been accepted. Serna de la Garza explained that *Torres* was dismissed because the basis of the accident—the design and manufacture—occurred in the United States. *Torres* was affirmed on appeal to the Guanajuato, Mexico, Supreme Court, but Serna de la Garza explained that the appellate decision offered no real guidance because it affirmed the dismissal of the plaintiff's case on the ground that the appeal was procedurally deficient, the decision did not include any analysis of the possible theories, and the court did not mention whether Ford submitted to the jurisdiction of the Mexican court and judge.

Ford stipulated that it would submit to the jurisdiction of the Mexican courts, abide by their rulings, and pay any final judgment. (Ford asserts on appeal that it also stipulated that it would make evidence available.)

The trial court ruled as follows:

> Faced with two experts who don't agree and one case which says that jurisdiction was not properly in Mexico, further being told that at best the parties can agree by

> contract, which there is none, or other agreement, which there was none prior to the filing of this lawsuit, this Court would find first and foremost that Mexico is not an alternative forum for this products case. But because I know we're going to end up in the Court of Appeals, I will go through the Cray[3] factors as well.
>
> * * *
>
> This Court does not find that there is a substantial inconvenience looking at the Cray factors. In fact, things are relatively equal. . . .
>
> The Court would decline to dismiss, finding first that there is no alternative forum in Mexico for this product liability case, and secondly, finding that each—even if there were, the Cray factors considered that forum non conveniens does not apply.

The trial court entered an order on August 16, 2005, denying Ford's motion.

Ford filed an application for leave to file an interlocutory appeal in this Court and a motion for a stay. This Court granted a stay and ordered the matter held in abeyance pending the Michigan Supreme Court's decision in *Radeljak v Daimler-Chrysler*.[4] In August 2006, after *Radeljak* was decided,[5] this Court, in lieu of granting leave to appeal, vacated the trial court's August 16, 2005, order, ordering the trial court to "provide an expanded analysis that addresses the competing [expert witness] arguments," taking *Juanes v Continental Tire North America, Inc*,[6] into consideration, and reconsid-

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[3] *Cray v Gen Motors Corp*, 389 Mich 382, 396; 207 NW2d 393 (1973).

[4] *Radeljak v DaimlerChrysler Corp*, 472 Mich 924, 924-925 (2005).

[5] *Radeljak v DaimlerChrysler Corp*, 475 Mich 598; 719 NW2d 40 (2006).

[6] *Juanes v Continental Tire North America, Inc*, unpublished memorandum opinion of the United States District Court for the Southern District of Illinois, issued September 26, 2005 (Docket No. 05-4015-JLF), 2005 WL 2347218.

ering "all of the *Cray* factors in light of *Radeljak v DaimlerChrysler*[.]"

On remand, the trial court briefly stated the facts of the underlying case and then considered a number of the *Cray* factors, again ruling that the case should not be dismissed under a forum non conveniens analysis. The trial court made no mention in its decision of *Radeljak*, *Garcia*, *Torres*, or *Juanes*,[7] the cases that this Court had instructed the trial court to consider on remand.

II. MEXICO AS AN AVAILABLE FORUM

A. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision whether to dismiss a case on the basis of forum non conveniens.[8] An abuse of discretion occurs when the trial court's "decision results in an outcome falling outside the principled range of outcomes."[9]

B. ANALYSIS

Forum non conveniens is a common-law doctrine defined as "the 'discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum.' "[10] As the Supreme Court

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[7] Pereznieto-Castro gave expert testimony in *Juanes*, which involved one of several United States federal court dismissals based on forum non conveniens, with a "return jurisdiction" provision in the event the plaintiff's complaint was rejected by the Mexican court. *Juanes* is not developed by either party on appeal.

[8] *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

[9] *Id*.

[10] *Id*. at 604, quoting Black's Law Dictionary (6th ed).

of Tennessee explained in *Zurick v Inman*,[11] the "doctrine of forum non conveniens presupposes the court has jurisdiction of both the parties and the subject-matter. The doctrine also presupposes there is at least one forum other than the forum chosen where the plaintiff may bring his cause of action[.]"

Here, the trial court indicated in its first order that application of the *Cray* factors was not required in this case because Mexico was not an available forum for Hernandez's cause of action. This Court vacated the trial court's order and remanded the case, explaining:

> The trial court's ruling that Mexico is not an alternate forum was too conclusory for this Court to sufficiently review, especially in light of the competing lengthy affidavits and arguments advanced by the parties. Therefore, the trial court is directed to provide an expanded analysis that addresses the competing arguments, and in doing so, shall consider *Juanes v Continental Tire North America, Inc*, 2005 WL 2347218 (SD Ill, 2005) regarding the impact of the *Garcia* and *Torres* decisions on the issue at hand in this case.[12]

On remand, the trial court did not specifically revisit whether Mexico was an alternate forum and did not consider or revisit the *Juanes* cases. However, in the context of addressing the *Cray* factors, the trial court did state that "[t]he Court was more persuaded by the assertion of the plaintiff's expert that even if Ford agrees to submit to the jurisdiction of the Mexican Court, the Mexican Courts are not obligated to take jurisdiction over the case."

This mirrors the reasoning in the trial court's initial order, in which it concluded that Mexico was not an

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[11] *Zurick v Inman*, 221 Tenn 393, 402; 426 SW2d 767 (1968).

[12] *Hernandez v Ford Motor Co*, unpublished order of the Court of Appeals, issued August 2, 2006 (Docket No. 264910) (*Hernandez I*).

available forum for Hernandez's action, and explained that there were "two experts who don't agree and one case which says that jurisdiction was not properly in Mexico . . . ." It appears that in both instances the trial court was referring to Hernandez's one expert, Pereznieto-Castro, and his explanation that the Mexican courts' dismissals of the *Garcia* and *Torres* cases was proof that Mexico did not have jurisdiction over an American corporation. Ford argues on appeal that Pereznieto-Castro's opinions should not have been the basis for the trial court's decision, and that other courts have sanctioned Pereznieto-Castro for asserting that Mexico is an unavailable forum in product liability cases involving accidents that occurred in Mexico, the same opinion he offered here.

The parties rely on numerous unpublished Mexican and United States federal district court cases for their respective positions, and Ford relies in part on Pereznieto-Castro's deposition testimony in a different case.[13] It is not clear what weight should be given to the Mexican court proceedings because it is difficult to surmise the reasons for the decisions, given the different procedures used by Mexican courts. None of the cited opinions is binding on this Court, and Pereznieto-Castro's deposition testimony was taken as evidence in a different case. But because the reasoning of some of the cases and Pereznieto-Castro's testimony on this issue may be instructive, some aspects of each will be discussed here.

The question of forum non conveniens, specifically whether Mexico is an available alternative forum, has

[13] According to the caption on the deposition transcript, Pereznieto-Castro was deposed in *In re Firestone/Ford Litigation* (*Villanueva*), 44th District Court, Dallas County, Texas, Docket No. 04-06717-B (Master File No. 01-01-410). The deposition was taken on October 19, 2006.

been addressed as part of an international, multi-jurisdictional federal product liability action.[14] Pereznieto-Castro has been involved in a number of the federal court cases,[15] including the *Garcia* and *Torres* cases noted in this Court's remand order, acting as a plaintiff's lawyer in Mexican proceedings, as a consultant, and as an expert witness in United States courts for the proposition that Mexico is not an available forum for a product liability case involving a foreign defendant.

In one of these actions, the United States Court of Appeals for the Seventh Circuit considered an appeal from a district court's dismissal of a case on the basis of forum non conveniens.[16] While the appeal in that case was pending, the plaintiffs filed an action in a district court in Morelos, Mexico, over which the Mexican district court determined it did not have jurisdiction. In considering the effect of the Mexican court's dismissal, the Seventh Circuit commented that "a suspicious haze surrounds the plaintiffs' actions in Mexico," noting that the plaintiffs did not inform either Bridgestone/Firestone or Ford of the Mexican proceed-

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[14] *In re Bridgestone/Firestone, Inc*, 305 F Supp 2d 927, 932 (SD Ind, 2004) (*Bridgestone I*), vacated and remanded 420 F3d 702 (CA 7, 2005). In this case, the court held that Mexico is an available and adequate forum when the defendants agree to submit to Mexico's jurisdiction. Among the long thread of cases included in Master File No. IP IP00-9374-C-B/S, MDL No. 1373 is *Mendoza v Bridgestone/Firestone, Inc* (Case No. IP 04-5797-C-B/S), in which Pereznieto-Castro also participated.

[15] Decisions in most of these product liability cases are apparently unpublished. It is unclear how many of the cases directly involved Pereznieto-Castro, but he testified in a deposition in another case that he was involved in several cases that he identified by name (*Donato, Villanueva, Abarca, Torres Ojeda, Gonzales, Lopez,* and *Garcia*), and that the ideas behind the Mexican jurisdictional argument were his.

[16] *In re Bridgestone/Firestone, Inc*, 420 F3d 702 (CA 7, 2005) (*Bridgestone II*).

ings, or inform the court in Morelos of the proceedings in the United States.[17] Despite having "substantial misgivings" about the plaintiffs' actions, the Seventh Circuit concluded that it lacked sufficient information to determine whether the plaintiffs' actions were taken in good faith.[18] Therefore, the Seventh Circuit remanded the case to the federal district court for a determination whether the plaintiffs acted in good faith, stating that if the plaintiffs did not act in good faith by manipulating the dismissal of their case in Mexico, the district court would be free to dismiss the case again.[19]

On remand, the federal district court conducted an evidentiary hearing to explore the circumstances surrounding the decisions of the Morelos court. Relying on expert testimony presented at the evidentiary hearing, the federal district court found that "there are several types of jurisdictional competence" in Mexico, and that the form of competence at issue in the case before it was "territorial" competence, which is similar to personal jurisdiction in the United States.[20] Territorial competence requires that a defendant be domiciled within the Mexican district court's jurisdictional territory, but may be waived or extended when a defendant is outside the court's territorial competence but there is nonetheless a point of contact within the forum.[21] The federal district court concluded:

> The evidence establishes that in filing the case in Morelos, Mexico, the attorneys for Plaintiffs acted with the

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[17] *Id*. at 706.

[18] *Id*.

[19] *Id*. at 706-707.

[20] *In re Bridgestone/Firestone, Inc*, 470 F Supp 2d 917, 920 (SD Ind, 2006) (*Bridgestone III*).

[21] *Id*. at 921.

> clear purpose of having the case dismissed; and, in seeking that result, manipulated the process to insure that the dismissal would be based on a particular reason that was calculated to improve the chances of the dismissal being sustained on appeal. In addition, the Morelos court's conclusion that it lacked territorial competency over the defendants and therefore could not try the matter pending before it was obtained in bad faith and therefore is not subject to recognition by courts in the United States.[22]

The federal district court also commented on Pereznieto-Castro's role in the case, noting that he acted as both the plaintiffs' Mexican counsel and as their legal expert in the United States, which it characterized as "a double role in this attempted fraud on the court . . . ."[23] The federal district court also observed that Pereznieto-Castro had accepted a contingency fee interest in the plaintiffs' recovery and improperly submitted an affidavit to the federal court without disclosing that interest.[24]

Hernandez maintains that there are no cases in which any plaintiff was able to successfully sue Ford in Mexico. Ford disagrees and identifies a case where it was successfully sued in Mexico, *Gonzalez v Ford Motor Co*, and includes a number of apparent pleadings filed against Ford in a Mexican federal civil court in that

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[22] *Id.* at 920.

[23] *Id.* at 928.

[24] *Id*. A month later, the federal district court sanctioned Pereznieto-Castro, whom it labeled "the apparent mastermind behind these frauds on the U.S. and Mexican courts . . . ." *In re Bridgestone/Firestone, Inc*, 470 F Supp 2d 931, 933 (SD Ind, 2006) (*Bridgestone IV*), vacated *De Manez v Bridgestone Firestone North American Tire, LLC*, 533 F3d 578 (CA 7, 2008). The Seventh Circuit Court of Appeals vacated the district court's sanction award because Pereznieto-Castro did not receive constitutionally adequate notice or an opportunity to be heard, and remanded the case to the district court for reconsideration.

case. Other federal courts have found that Mexico is an available jurisdiction for tort actions of Mexican citizens.[25]

Understanding any general rule in Mexican law is complicated by the fact that there are separate civil codes in all 31 Mexican states, as well as a federal code in Mexico, and that some of the foundational rules are different than in American courts. Despite those differences, however, Pereznieto-Castro acknowledged that under Mexican law, Mexican courts have jurisdiction of a tort action if both parties agree to submit to that jurisdiction, and that a foreign defendant could establish its submission under a variety of circumstances, including appearing in court or filing a response.

Ex parte proceedings are apparently legal in Mexico, and it appears that a plaintiff there can avoid jurisdiction by not following the Mexican courts' specific procedures. In his deposition in *Villanueva*, Pereznieto-Castro stated that a Mexican lawyer does not act in bad faith by filing an action there and urging dismissal, explaining that it is legal and appropriate for a lawyer to go to a judge, ex parte, and urge dismissal, and that a lack of notice or an attempt to have a case dismissed was not considered bad faith under Mexican law. That view was rejected, however, by the court in *Bridgestone III*, which concluded that Pereznieto-Castro acted in bad faith by deliberately seeking to obtain dismissal of a Mexican case in an attempt to show that Mexico was not an available forum for the action.[26]

Some of the Mexican cases suggest that Mexico's procedural rules are very different from those of Michi-

[25] See *Gonzales v Chrysler Corp*, 301 F3d 377, 380 n 3 (CA 5, 2002) (finding that Mexico was "an amenable forum because the defendants have agreed to submit to the jurisdiction of the Mexican courts").

[26] *Bridgestone III*, *supra* at 920-921.

gan courts and that it may be difficult for Hernandez to bring a cause of action there. But it appears from the Mexican and the United States federal court cases, and even from Pereznieto-Castro's deposition testimony in *Villanueva*, that a plaintiff can successfully bring an action there by complying with applicable procedural rules, and one could reasonably presume that a lawyer who practices in Mexico would know those rules. As recognized in *Bridgestone III*, territorial jurisdiction in Mexico generally requires that a defendant be domiciled within the court's jurisdictional territory, but such jurisdiction may be waived or extended when a defendant is outside the court's territorial competence and there is a point of contact within the forum.[27] This case arises from an accident in Mexico, and Ford has agreed to stipulate that it will submit to jurisdiction in Mexico, pay any judgment, and comply with any rules of the foreign jurisdiction. Accordingly, Mexico appears to be an available forum to hear this case.

Although not a focus of the parties' arguments on appeal, this Court's prior remand order in *Hernandez I* directed the trial court to "consider *Juanes v Continental Tire North America, Inc*, 2005 WL 2347218 (SD Ill, 2005)[,] regarding the impact of the *Garcia* and *Torres* decisions on the issue at hand in this case." In *Juanes*, the United States District Court for the Southern District of Illinois dismissed the plaintiff's product liability action on the basis of forum non conveniens.[28] In doing so, it rejected the plaintiff's reliance on the *Garcia* and *Torres* cases, in which Pereznieto-Castro participated, as supporting the plaintiff's proposition that Mexico is not an available forum in a product liability case, explaining that the cases were dismissed

[27] *Id*. at 921.

[28] *Juanes*, *supra* at *6.

because of errors. In *Garcia*, the defendant "failed to meet the requirement of identifying, in a clear and precise way, the specific judge to whom they were submitting themselves."[29] Also, "[w]ith regard to the *Torres* case, defendants note that there is no indication in either of the trial and appellate court's opinions that either court was made aware that the defendants in the case had submitted themselves to the jurisdiction of the Mexican courts."[30] The *Garcia* court concluded that the Mexican courts would have jurisdiction over a United States corporation not domiciled in Mexico "as long as it is done properly."[31]

Furthermore, Pereznieto-Castro stated in his deposition that the Mexican cases on which he relied for his opinion that Mexico would not have jurisdiction over a foreign defendant, including *Garcia* and *Torres*, lack precedential value, even in Mexico. Pereznieto-Castro explained that it is rare for a case to have precedential value in Mexico.[32]

In sum, as other courts have concluded, the *Garcia* and *Torres* cases do not clearly establish that Mexico would not be an available forum to hear this case, especially where Ford is willing to stipulate jurisdiction in Mexico. Further, Hernandez's remaining arguments against finding Mexico as an available forum are based principally on the opinions of Pereznieto-Castro, which have been criticized and rejected by other courts, and which appear to be based more on his own personal beliefs of what the law

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[29] *Id*. at *2.

[30] *Id*.

[31] *Id*.

[32] Pereznieto-Castro claimed, however, that he would soon have written authority to support his opinion, because he had written a new version of his textbook on conflict of law, and had recommended that Mexican courts not take jurisdiction over foreign defendants.

ought to be than what it actually is. As such, Pereznieto-Castro's opinions do not provide a reliable basis for concluding that Mexico is not an available forum to hear this case. Conversely, it appears that Mexico is an available forum if Ford agrees to submit to jurisdiction in Mexico, which it has indicated it is willing to do.

For these reasons, the trial court abused its discretion by deciding that Mexico was not an available forum for this action by a Mexican citizen regarding injuries sustained in an accident in Mexico.

III. THE *CRAY* FACTORS AND DISMISSAL ON THE BASIS OF FORUM NON CONVENIENS

A. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision whether to dismiss a case on the basis of forum non conveniens.[33] A trial court's conclusion after application of the *Cray* factors is an abuse of discretion when it is "outside the principled range of outcomes . . . ."[34]

B. THE *CRAY* FACTORS

This Court in *Hernandez I* instructed the trial court to consider on remand all the factors set out in *Cray v Gen Motors Corp*,[35] in light of the Michigan Supreme Court's decision in *Radeljak*.[36]

In *Cray*, the Michigan Supreme Court determined that the doctrine of forum non conveniens should apply in Michigan and explained that the decision whether to accept jurisdiction required "[a] balancing out and weigh-

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[33] *Radeljak*, *supra* at 603.

[34] *Id*. at 606 (quotation marks and citations omitted).

[35] *Cray*, *supra* at 396.

[36] *Radeljak*, *supra* at 605-606.

ing" of several factors.[37] The Supreme Court explained that "courts are charged to consider the plaintiff's choice of forum and to weigh carefully the relative advantages and disadvantages of jurisdiction and the ease of and obstacles to a fair trial in this state."[38]

In *Radeljak*, the Michigan Supreme Court reconsidered and explained the application of the doctrine. As in this case, *Radeljak* involved a situation in which the plaintiff's decedent was killed in a car accident in a foreign country involving an automobile manufactured in the United States, except that the foreign jurisdiction in *Radeljak* was Croatia.[39] The Michigan Supreme Court approved the use of the *Cray* factors, held that dismissal may be warranted if a plaintiff chooses a particular forum solely to take advantage of the more favorable law rather than because it was convenient, determined that a foreign plaintiff's choice of forum should be given less deference than would be accorded to a domestic plaintiff, and concluded that a court had discretion to refuse to hear a case even if the Michigan court was not "seriously inconvenient."[40]

Here, the trial court considered each of the *Cray* factors, but did not consider the effect of *Radeljak*. We will address each of the *Cray* factors along with the trial court's findings.

1. THE PRIVATE INTEREST OF THE LITIGANT

(a) AVAILABILITY OF COMPULSORY PROCESS FOR ATTENDANCE OF UNWILLING WITNESSES AND THE COST OF OBTAINING ATTENDANCE OF WILLING WITNESSES

The trial court determined that witnesses are "sub-

[37] *Cray*, *supra* at 395.

[38] *Id*. at 396.

[39] *Radeljak*, *supra* at 602-603.

[40] *Id.* at 605-606, 612-618.

ject to compulsory process for depositions under the Hague Convention," regardless of the trial location, and the trial court was "not persuaded that this factor favors dismissal." The trial court correctly recognized that Michigan courts do not have the power of compulsory process over Mexican witnesses and that defendant would have to use "letters rogatory" to obtain testimony from witnesses unwilling to travel.[41] In fact, it appears that both parties would normally have to use letters rogatory, although Ford stipulated in this case that it would make its witnesses available voluntarily. "The use of letters rogatory is acknowledged to be a very time consuming and cumbersome process."[42] Each party, if trial were in the other forum, would incur the expense for the attendance of willing witnesses. The trial court found that this factor did not favor dismissal, and we agree that it would normally not favor either party. Because of Ford's stipulation, however, that it would voluntarily provide its witnesses if the case were heard in Mexico, this factor slightly favors a Mexican forum.

(b) EASE OF ACCESS TO SOURCES OF PROOF

The trial court found that although the documents and proofs regarding the accident are located in Mexico, they are "likely to be small in number" compared to the technical documents in the United States regarding product design. Because both sets of documents would have to be translated, and the Mexican documents appear to be fewer, the trial court found that "[t]his factor disfavors dismissal."

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[41] See the United States Department of State website: <http://travel.state.gov/law/info/ judicial/judicial_683.html> (accessed August 14, 2008).

[42] *Radeljak*, *supra* at 607.

The accident, the witnesses to the accident, the Explorer, and any repair records for the Explorer, are all located in Mexico. Although Hernandez suggests that it is incomprehensible that Ford would consider Mexico more "convenient" than Michigan, it would be easier to obtain sources of proof regarding the accident and this specific vehicle in Mexico. And while the documentary evidence relating to design and manufacture is located in the United States, Ford has stipulated that it will make that evidence available. Michigan law authorizes subpoenas for document production when an action is pending in another country and, as was also true in *Radeljak*, Hernandez shows no similar provision under Mexican law.[43] In addition, as the Seventh Circuit explained in *Bridgestone II*, the "U.S.-specific information" in this multi-jurisdictional litigation has already been established, and only the accident-specific evidence in individual cases needed to be collected.[44] Therefore, it appears that the parties would have easier access to those proofs in Mexico, where the accident occurred, and that the trial court abused its discretion by ruling that this factor disfavored dismissal. This factor favors the Mexican forum.

(c) DISTANCE FROM THE SITUS OF THE ACCIDENT OR INCIDENT THAT GAVE RISE TO THE LITIGATION

The trial court noted in passing that "[t]he proofs regarding the accident, other than live testimony of any witnesses will involve accident reconstruction techniques and are not affected by the distance from the cite [sic] of the incident." Michigan is far from Mexico, where the accident occurred, but is the alleged site of the decisions regarding the Explorer's design. The

[43] MCR 2.305; *Radeljak*, *supra* at 608.

[44] *Bridgestone II*, *supra* at 705.

parties have not established that either forum is favored under this subsection.

(d) ENFORCEABILITY OF ANY JUDGMENT OBTAINED

The trial court found that "[a]ny judgment obtained in Michigan is enforceable against the defendant. The defendant asserts that it will voluntarily pay any Mexican judgment. Voluntary payment is an unenforceable gratuity and this factor favors keeping the case in the United States." Ford stipulated that it would pay any nonappealable foreign judgment, and Hernandez does not explain why she could not obtain an enforceable court order of Ford's stipulations. Moreover, in its original ruling, the trial court found that "[t]he judgments are enforceable regardless of in which country." Neither the trial court nor Hernandez explains what has changed in this regard. This factor is neutral.

(e) POSSIBLE HARASSMENT OF EITHER PARTY

The trial court did not address this factor on remand. However, in its initial opinion, it stated, "I don't see any harassment that's here." It appears that this factor is neutral.

(f) OTHER PRACTICAL PROBLEMS THAT CONTRIBUTE TO THE EASE, EXPENSE, AND EXPEDITION OF THE TRIAL

As a practical problem contributing to its decision, the trial court stated that the plaintiff's choice of counsel was also a factor to consider: "The Plaintiff has chosen Counsel from Oklahoma. Unfortunately, she did not pick one of our superior Michigan lawyers. However, her choice of Counsel will be [eviscerated] if the case is moved to Mexico." The trial court gave no explanation why a Michigan forum is favored because of a foreign plaintiff's choice of an Oklahoma attorney to

pursue a tort action that arose from the death of a Mexican citizen in an accident in Mexico. To the extent that the trial court was weighing Hernandez's choice of forum under this factor, the Michigan Supreme Court stated in *Radeljak* that a trial court "should afford a foreign plaintiff's choice of forum less deference than it would accord a domestic plaintiff."[45]

The trial court also considered the problems with "language issues," explaining that "both jurisdictions will be faced with letters rogatory and translation issues. It is no easier for our neighbors in Mexico to translate English to Spanish than it is for us to translate Spanish to English. The recent certifications of translator services in Michigan is not a unique issue in a global economy and Michigan is competent to manage it." We do not believe that the additional considerations, choice of counsel, and language, favor either forum.

(g) POSSIBILITY OF VIEWING THE PREMISES

The trial court explained that "[t]his factor favors dismissal. However, the frequency of actual visits to an accident site are rare, at least in the United States. It is much more likely that a 'view' will be done by simulation or digital recording." The trier of fact in a Michigan court would not be able to view the scene of the accident. Regardless of what the parties decide to do in a trial, there remains the possibility that the accident site could be viewed in a Mexican forum, and there is no chance of a visit to the site if the trial is held in Michigan. This factor favors the Mexican forum.

On balance, four of the factors relating to the private interest of the litigant are neutral, and three factors favor a Mexican forum. Neither of the trial court's

[45] *Radeljak*, *supra* at 618.

additional considerations changed that balance, so the "private interest" factors favor dismissal in the Michigan forum.

2. MATTERS OF PUBLIC INTEREST

(a) ADMINISTRATIVE DIFFICULTIES THAT MAY ARISE IN AN AREA THAT MAY NOT BE PRESENT IN THE AREA OF ORIGIN

The trial court considered the "inability to interplead other parties" and rejected Ford's claim that it could not interplead unidentified Mexican parties in a Michigan forum. The trial court concluded that "[t]he mere assertion that some other unknown, unnamed, or undescribed person might need to interplead does not create for this Court a basis for declining jurisdiction. This factor does not favor dismissal. Moreover, MCL 600.2957 allows consideration for the fault of all parties and non-parties regardless of whether they are present in the case in any case in Michigan.[46] Therefore, consideration of fault of non-parties is not obviated by their inability to be interpled."

In *Radeljak*, the Michigan Supreme Court explained that the American defendant there would not be able to implead Croatian people or entities that might be responsible for the plaintiff's injuries, and that the inability to implead was a factor that favored the Croatian forum.[47] The same is true here, where Ford could not implead, for instance, the Explorer's driver or mechanic, if the case were tried in Michigan. It is not fatal that Ford has not identified a specific individual. " '[T]he problems posed by the inability to implead potential third-party defendants' is 'sufficient to sup-

[46] MCL 600.2957 provides that each person's liability should be allocated and that a percentage of fault can be assessed against a nonparty.

[47] *Radeljak*, *supra* at 609.

port dismissal on grounds of *forum non conveniens*.' "[48] This factor favors a Mexican forum, and the trial court abused its discretion in stating otherwise.

(b) CONSIDERATION OF THE STATE LAW THAT MUST GOVERN THE CASE

The trial court did not consider this issue because it had not been briefed, stating:

> This Court is aware there is a conflict as to which law applies to this case.
>
> The defendant argues that Mexican products law is applicable and will cause incredible difficulty in its application. They ask the Court to consider *Hall v General Motors*, 229 Mich App, 580, at 55 [sic], 583 [sic] Northwest 2d, 866, a 1998 case.[49]
>
> The plaintiff asserts that Michigan law applies and asks the Court to look instead at *Olmstead v Anderson*, 428 Michigan [1].[50]
>
> Both cases apply an interesting analysis. Without rendering what this Court believes is a premature decision on conflict of laws, the Court would note that while Mexico has an interest in its citizens' safety, Michigan has a deep and abiding interest in the mass production of automobiles and the protection of the stream of commerce arising from those automobiles.
>
> Until and unless the issues of conflict of laws are fully briefed and argued, this Court cannot and will not determine that Mexico's interests are superior to Michigan.

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[48] *Id*., quoting *Piper Aircraft Co v Reyno*, 454 US 235, 259; 102 S Ct 252; 70 L Ed 2d 419 (1981).

[49] In *Hall v Gen Motors Corp*, 229 Mich App 580, 585; 582 NW2d 866 (1998), this Court applied the "interest analysis" to choice of law in a case involving an accident in North Carolina involving a plaintiff who later moved to Michigan.

[50] *Olmstead v Anderson*, 428 Mich 1, 3; 400 NW2d 292 (1987), involved an automobile accident in Wisconsin where Minnesota citizens were struck and killed by a Michigan resident.

In *Radeljak*, the Michigan Supreme Court explained that "courts look to see which jurisdiction has a greater interest in the case" in order to determine whose laws apply.[51] Here, Mexico has an interest because a Mexican citizen was killed in an accident on Mexican soil, in a vehicle purchased in Mexico. As the trial court suggested, Michigan citizens do have an interest in Ford's business because it affects this state's economy, but Michigan citizens were not directly involved in the fatal accident. While both forums have some interest in this proceeding, Mexico's interest in having this case, involving redress to a Mexican citizen, "decided by its own rules and procedures" appears greater.[52] Although the trial court declined to make a finding regarding choice of law, we believe it is more likely that Mexican law would apply, and that this factor favors Mexico as a forum.

(c) PEOPLE WHO ARE CONCERNED WITH THE PROCEEDING

In *Radeljak*, the Michigan Supreme Court balanced Croatia's "local interest" in a "localized controversy" involving the fatal accident there and the interest of Michigan citizens in "products-liability lawsuits filed against Michigan manufacturers."[53] In *Radeljak*, the Michigan Supreme Court concluded that, for the same reasons it discussed with regard to factor 2(b), Croatia's interest was greater than Michigan's interest.[54]

On appeal, Hernandez suggests that her "best opportunity for full compensation and justice rests in Michigan," and that Mexico's "primary interest in this case is

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[51] *Radeljak*, *supra* at 610; see also *Olmstead*, *supra* at 5-6.

[52] *Radeljak*, *supra* at 611.

[53] *Id*.

[54] *Id*.

having its citizens fully compensated for their losses." These arguments work against the choice of Michigan as a forum because " 'dismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to . . . take advantage of favorable law.' "[55] As the Michigan Supreme Court explained in *Radeljak*, when a plaintiff chooses a forum in another country thousands of miles away from the accident, "there is no basis to presume that this faraway forum will be more convenient to the parties and to the court, and, thus, there is no basis to defer to the plaintiff's choice of forum."[56] The trial court did not specifically address this factor, but given that a Mexican citizen was killed in an accident in Mexico and that his Mexican widow is bringing this action, we conclude that this factor favors the Mexican forum.

3. REASONABLE PROMPTNESS IN RAISING THE PLEA OF FORUM NON CONVENIENS

The trial court did not address this factor, and Hernandez does not assert that Ford's claim was untimely. Therefore, this factor is neutral.

4. CONCLUSION

All three of the "public interest" factors favor a Mexican forum, and the promptness factor is neutral. None of the factors, under either the private or the public interest considerations, favors a Michigan forum. Therefore, we conclude that a balancing and weighing of the *Cray* factors leads to the conclusion that Mexico is the more appropriate forum. Because Mexico is an available forum and the *Cray* factors favor Mexico, the

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[55] *Id*. at 613, quoting *Piper*, *supra* at 249 n 15.

[56] *Radeljak*, *supra* at 613-614.

trial court's decision was not within the "principled range of outcomes," and the trial court therefore abused its discretion in denying Ford's motion to dismiss on the basis of forum non conveniens.[57]

We reverse and remand for entry of an order dismissing Hernandez's cause of action. We do not retain jurisdiction.

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[57] *Radeljak*, *supra* at 603.

FIRST NATIONAL BANK OF CHICAGO
v DEPARTMENT OF TREASURY

Docket No. 272431. Submitted January 8, 2008, at Lansing. Decided September 9, 2008, at 9:00 a.m. Leave to appeal sought.

First National Bank of Chicago, as trustee for BankBoston Home Equity Loan Trust 1998-1, brought an action in the Court of Claims against the Department of Treasury and the Department of Natural Resources, claiming a violation of due process of law and an unconstitutional taking of property without just compensation with respect to realty that was sold at a tax-foreclosure sale and in which BankBoston had a mortgage interest but did not receive notice of forfeiture and foreclosure proceedings. The original mortgagee, Homestead Mortgage Company, had assigned its mortgage interest to Investaid Corporation, which in turn had assigned its interest to BankBoston. Title Check, L.L.C., working under contract with defendants, had sent notices meant for BankBoston not to the address listed with the county register of deeds, but to an address it found on the Internet for FNB, with which BankBoston had merged. Following a bench trial, the court, James R. Giddings, J., awarded a money judgment for the plaintiff with interest calculated pursuant to MCL 600.6455(2). The defendants appealed, and the plaintiff cross-appealed with respect to the interest award.

The Court of Appeals *held*:

1. BankBoston was entitled under MCL 211.78i(6) to notice of the show-cause hearing under MCL 211.78j and the foreclosure hearing under MCL 211.78k.

2. The plaintiff, as BankBoston's trustee, had standing to bring suit on BankBoston's behalf. MCL 600.2041.

3. Notwithstanding the misidentification of the realty's lot number in the recorded interest of Homestead, other instruments in the chain of title created by the register of deed's grantor-grantee index, MCL 565.28(1), indicated the subsequent assignment of the mortgage interest to BankBoston.

4. The defendants failed to satisfy the requirements of minimal due process when Title Check ignored the BankBoston address

filed with the register of deeds. The notices that were sent were not reasonably calculated to apprise it of the forfeiture hearings.

5. The recording of the forfeiture certificate before the mortgage-interest assignment from BankBoston to the plaintiff did not provide BankBoston and the plaintiff with notice of the foreclosure. The defendants were under an obligation to provide proper notice to BankBoston.

6. The Court of Claims properly awarded interest pursuant to MCL 600.6455(2) instead of interest as provided in the mortgage contract. The plaintiff's action was based on a denial of due process, a constitutional tort, and was not based on the mortgage contract.

7. The Contracts Clause prohibition against statutes that impair obligations of contract, US Const, art I, § 10; Const 1963, art 1, § 10, was not violated with respect to the award of interest as provided under MCL 600.6455(2) instead of as provided in the mortgage contract. The application of the statute did not substantially impair a contractual relationship.

Affirmed.

O'CONNELL, J., dissenting, stated that defendants were not statutorily required to provide the plaintiff with notice because the certificate of forfeiture was recorded before the plaintiff's mortgage assignment. In any event, BankBoston's assignment of its interest to the plaintiff does not enable the plaintiff to assert BankBoston's personal right to notice. In sending the notices to FNB, Title Check sent the notice required by due process, i.e., notice reasonably calculated under the circumstances to apprise the interested party of the pendency of forfeiture proceedings and afford it an opportunity to present its objections.

TAXATION — REAL PROPERTY — TAX SALES — NOTICES TO MORTGAGEES.

A mortgagee that obtains a money judgment for denial of due process against a governmental agency that sells the mortgaged property at a tax sale without properly notifying the mortgagee of the forfeiture and foreclosure proceedings is entitled to interest on the judgment pursuant to MCL 600.6455(2), and not at the interest rate of the mortgage.

Russell & McCargar, LLP (by *Walter J. Russell*), for the plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Kevin T. Smith*, Assistant Attorney General, for the defendants.

Before: KELLY, P.J., and CAVANAGH and O'CONNELL, JJ.

KELLY, P.J. Defendants appeal as of right the judgment of the Court of Claims in favor of plaintiff following a bench trial. Plaintiff cross-appeals from the same judgment. We affirm.

I. BASIC FACTS AND PROCEDURAL BACKGROUND

This action arose after a parcel of residential property was foreclosed under the General Property Tax Act (GPTA), MCL 211.1 *et seq.*, for the failure to pay property taxes. The trial court heard the matter on stipulated facts and exhibits, and we set forth the relevant facts here.

Brandon Larsson and Mary Larsson were owners of the property located at 604 East Oak Street in St. Johns, Michigan. The property was identified in the recorded deed as lot 66 of Prince Estates No. 2. On October 31, 1997, the Larssons obtained a promissory note for $115,200 that was secured by a first mortgage to Homestead Mortgage Company (Homestead). The mortgage was recorded with the Clinton County register of deeds on November 5, 1997, containing an incorrect lot number, but identifying the correct street address and permanent tax parcel identification number.[1] On November 7, 1997, Homestead assigned the first mortgage to Investaid Corporation (Investaid), and recorded that assignment on January 20, 1998. The recorded assignment included the correct lot number and street address.

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[1] The Clinton County register of deeds interpreted the property description in the mortgage to read "lot 88 of Prince Estates No. 2," rather than "lot 66," and indexed it accordingly. According to the Clinton County Register of Deeds, Carol Wooley, recorded mortgages cannot be searched by tax identification number and deeds recorded before 2001 cannot be searched by tax parcel identification number.

The 1999 property taxes on the property, due February 14, 2000, were never paid.[2] On February 23, 2000, Investaid assigned the first mortgage to BankBoston, NA (BankBoston), formerly known as First Bank of Boston, and the assignment listed BankBoston's address as 100 Federal Street, Boston, Massachusetts, 02210. Shortly thereafter, BankBoston merged with Fleet National Bank and changed its name to FNB. FNB's registered address was 111 Westminster Street, Providence, Rhode Island, 02903-2305. On April 3, 2000, the assignment from Investaid to BankBoston was recorded and correctly described the subject property as lot 66 along with the correct street address and permanent tax parcel identification number.

On March 20, 2001, a certificate of forfeiture from the state was recorded describing the property as lot 66 and containing the correct street address and permanent tax parcel identification number. On April 15, 2001, an assignment of the first mortgage from BankBoston to plaintiff was recorded, again describing the property as lot 66 and containing the correct street address and permanent tax parcel identification number. Of particular note, the assignment listed plaintiff's address as 100 Federal Street, Boston, Massachusetts, 02210, the same address listed for BankBoston in the February 23, 2000, mortgage assignment.

On June 18, 2001, a petition for foreclosure was recorded describing the property as lot 66 and containing the correct permanent tax parcel identification number. On August 10, 2001, the first mortgage to Homestead Mortgage was rerecorded to clarify the property description, which described the property as lot 66 and contained the correct street address and

[2] On November 23, 1999, Brandon quitclaimed the property to Mary. The quitclaim deed was recorded on July 11, 2000.

permanent parcel identification number. On that same day, the assignment from Homestead to Investaid was rerecorded, describing the property as lot 66 and containing the correct street address. Also on that same day, the assignment from Investaid to BankBoston was rerecorded, describing the property as lot 66 and contained the correct street address and permanent parcel identification number.

Defendants contracted with Title Check, L.L.C. (Title Check), an outside source, to locate the addresses of interested parties through real estate and other records and to send notices of the forfeiture and foreclosure proceedings. Title Check sent notices of the forfeiture and foreclosures hearings through registered mail, return receipt requested, to Mary Larsson, Homestead, Investaid, and BankBoston, and those notices were delivered and signed for between December 6 and 19, 2001.

Except for BankBoston, Title Check sent all notices to the addresses recorded with the Clinton County register of deeds. With respect to BankBoston, rather than sending notices to the address recorded with the Clinton County register of deeds, the notices were addressed to 111 Westminster Street, c/o FNB, Providence, Rhode Island, 02903-2305 and to 15 Westminster Street, Providence, Rhode Island, 02903-2305. Title Check obtained the Rhode Island addresses from the Federal Deposit Insurance Corporation (FDIC) website listing for financial institutions. During all times relevant to these proceedings, plaintiff continued to maintain an office at 100 Federal Street, Boston, Massachusetts, to accept service of process regarding any mortgages where "BankBoston had been a party of interest in the mortgage or the security given for the mortgage," including the February 23, 2000, mortgage

assignment. Title Check's tracing worksheet does not disclose that it was aware of the April 15, 2001, recorded mortgage assignment from BankBoston to plaintiff. No notices were mailed to either plaintiff or BankBoston at the address listed in the recorded mortgage assignment from Investaid to BankBoston. Notices of the forfeiture and foreclosure hearing were also published in the Clinton County News on December 23 and 30, 2001, and on January 6, 2002, listing, in part, BankBoston as an interested party.

Following a foreclosure hearing, a judgment of foreclosure was issued in the amount of $2,316.24. A July 30, 2002, notice of judgment of foreclosure was recorded on September 20, 2002. On September 23, 2002, the property was sold at auction for $109,000, with a minimum bid starting at $7,800 to cover delinquent taxes, interest, penalties, and costs associated with foreclosure.

Plaintiff brought this action against defendants, asserting that its mortgage interest had been foreclosed without due process. In its amended complaint, plaintiff asserted that the amount in excess of the taxes owed, penalties, and fees taken as authorized by MCL 211.78n amounted to an unconstitutional taking without just compensation. Plaintiff argued that while BankBoston and plaintiff's addresses were known at the time of forfeiture and foreclosure, notice was not sent to the required address, amounting to a denial of due process. Plaintiff claimed that as an assignee and trustee of BankBoston, it was entitled to assert the rights of its assignor and beneficiary, including the right to proper statutory notice and due process regarding foreclosure. Plaintiff further argued that the enforcement of the GPTA by defendants resulted in an unconstitutional taking because it amounted to a taking of

private property for public use and plaintiff did not receive just compensation for the taking.

Defendants contended that no violation of due process occurred because the recorded forfeiture certificate, at a minimum, gave plaintiff constructive notice of the forfeiture and the impending foreclosure proceedings, and that the certified notices sent to BankBoston at the address indicated by the FDIC website and a second address were sufficient to comply with due process. Defendants also asserted that plaintiff was on notice of the forfeiture and the pending foreclosure because the April 15, 2001, mortgage assignment from BankBoston to plaintiff was recorded after the certificate of forfeiture was recorded. According to defendants, neither plaintiff's nor its predecessor's interest in the property could be identified by public records because plaintiff's interest had yet to be recorded when the forfeiture certificate was issued, and because neither the first mortgage nor the mortgage assignments were in the chain of title when the forfeiture certificate was recorded because the first mortgage incorrectly referred to lot 88. Further, defendants claimed that it was unclear whether plaintiff actually had an interest in the property because the 1998 assignment from BankBoston to plaintiff was purportedly executed before BankBoston obtained an interest in 2000. Defendants also denied that an unconstitutional taking without just compensation occurred because plaintiff's interest in the property ended upon foreclosure.

The Court of Claims found in favor of plaintiff, concluding that it was denied due process. The court found that defendants did not afford BankBoston or its trustee, plaintiff, due process because Title Check failed to mail notice to BankBoston's last known address as identified in the mortgage assignment and character-

ized that address as the address reasonably calculated to apprise BankBoston and plaintiff, its trustee, of the then pending hearings. The court further concluded that in regard to MCL 211.78i(9), BankBoston was an owner of a property interest entitled to notice. To that end, the court concluded that the subsection did not preclude plaintiff from raising the due process claim for itself or on behalf of its beneficiary, BankBoston, because neither was properly served. The Court of Claims entered a judgment in plaintiff's favor together with interest calculated under MCL 600.6455(2).

II. STANDARDS OF REVIEW

Following a bench trial, a trial court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). A finding is clearly erroneous when, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *Id.* Resolving this issue involves questions of statutory interpretation, which are reviewed de novo. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005). "The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent[,]" and the "Legislature is presumed to have intended the meaning it plainly expressed." *Linsell v Applied Handling, Inc*, 266 Mich App 1, 15; 697 NW2d 913 (2005). If statutory language is clear and unambiguous, we are required to apply the statute as written. *Id.* Whether a party has been afforded due process is a question of law that is reviewed de novo. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

III. ENTITLEMENT TO NOTICE

Defendants argue that the Court of Claims effectively concluded that plaintiff was statutorily entitled to notice and this constitutes error requiring reversal. While plaintiff's interest was not recorded until after the certificate of foreclosure was filed, BankBoston was entitled to notice as a trust beneficiary that retained a properly recorded interest in the property. Accordingly, under the circumstances of this case, we do not find any error in the Court of Claims decision.

Under MCL 211.78i, an interest holder identified in the records of the register of deeds is entitled to notice if identifiable before a certificate of forfeiture is recorded. MCL 211.78i(1) provides that, once a property has been forfeited to the county treasurer under § 78g, MCL 211.78g, the foreclosing governmental unit is required to initiate a record search to identify the property owners entitled to notice of the subsequent show cause hearing under § 78j, MCL 211.78j, and the foreclosure hearing under § 78k, MCL 211.78k. The notice provisions of § 78i(6) that were in effect in 2001, when the notices were sent, provided:[3]

> The owner of a property interest is entitled to notice under this section of the show cause hearing under section 78j and the foreclosure hearing under section 78k if that owner's interest was identifiable by reference to any of the following sources before the date that the county treasurer records the certificate[4] required under section 78g(2):
>
> (a) Records in the office of the county register of deeds.
>
> (b) Tax records in the office of the county treasurer.
>
> (c) Records in the office of the local assessor.

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[3] This section was amended by 2003 PA 263, effective January 5, 2004, and has since been amended by 2006 PA 611, effective January 3, 2007.

[4] The certificate refers to the certificate of forfeiture. MCL 211.78g(2).

(d) Records in the office of the local treasurer.

The notice provisions in § 78i "are designed to ensure that those with an interest in the subject property are aware of the foreclosure proceedings so that they may take advantage of their redemption rights." *In re Petition by Wayne Co Treasurer*, 265 Mich App 285, 292-293; 698 NW2d 879 (2005).

A. BANKBOSTON'S ENTITLEMENT TO NOTICE

Plaintiff is the trustee for the BankBoston Home Equity Loan Trust 1998-1, and BankBoston is the servicer of the trust pursuant to a power of attorney and a servicing agreement. As such, BankBoston is a beneficiary that retained a property interest when it assigned the mortgage to plaintiff. Therefore, for purposes of MCL 211.78i(6), BankBoston was an owner of a property interest entitled to notice at the time the state was required to send notices. See *Bankers' Trust Co of Detroit v Russell*, 263 Mich 677, 682; 249 NW 27 (1933) (reasoning that a trustee holds interest in property for the benefit of another). Further, pursuant to MCL 600.2041, plaintiff, as trustee, is statutorily permitted to file a lawsuit on behalf of BankBoston, its beneficiary. See *American Family Ass'n of Michigan v Michigan State Univ Bd of Trustees*, 276 Mich App 42, 51; 739 NW2d 908 (2007) (noting that a plaintiff must meet both the statutory and constitutional requirements in order to have standing). Ultimately, given the relationship between plaintiff and BankBoston and BankBoston's initial ownership of a property interest and continuing beneficial ownership interest in that property interest, it is irrelevant whether plaintiff was entitled to notice under MCL 211.78i(6) because BankBoston, its beneficiary, was entitled to notice that it did

not receive as required by statute, and plaintiff was allowed to bring suit on its behalf.

B. ERRONEOUS PROPERTY DESCRIPTION

Defendants assert that, because the first mortgage of Homestead improperly described the property as lot 88 instead of lot 66, those subsequently recorded instruments that correctly described the property as lot 66 were nevertheless unidentifiable for purposes of the period when the foreclosing entity was required to search the register of deeds to identify interests in the property as provided under the applicable version of MCL 211.78i(6). However, defendants mistakenly assert that those instruments were outside the chain of title, i.e., undiscoverable at the register of deeds. MCL 565.28(1) requires every register of deeds to keep a general index to each set of books by alphabetically entering the name of each party to each recorded instrument. This grantor-grantee index creates the chain of title to a particular property. 1 Cameron, Michigan Real Property Law (3d ed), § 11.29, p 404. A person is on constructive notice of those instruments appearing within a chain of title. *Houseman v Gerken*, 231 Mich 253, 255; 203 NW 841 (1925).

Here, a search of the former owners' names would have revealed the name of the first mortgage provider, Homestead, and a search of Homestead's name would have revealed Investaid's name, thereafter revealing the name of BankBoston. Accordingly, those instruments were not outside the chain of title. Further, because the mortgage assignment to BankBoston accurately described the property, the foreclosing entity had, at a minimum, constructive notice of BankBoston's interest in the property. Cf. *Savidge v Seager*, 175 Mich 47, 59-60; 140 NW 951 (1913) (concluding that the

recorded instrument did not provide constructive notice of an interest in the property because the description was too inaccurate).

IV. NOTICE AND DUE PROCESS

Defendants claim that given the circumstances, the notices sent to the Rhode Island addresses were sufficient to satisfy due process. We disagree. As our Supreme Court has recently held, an address reasonably calculated to reach a person entitled to notice is the address listed on a recorded deed. *Sidun v Wayne Co Treasurer*, 481 Mich 503; 751 NW2d 453 (2008). Because defendants had BankBoston's address but chose to disregard it and send the notices to other addresses obtained from the Internet, defendants failed to provide minimal due process. *Id.* at 514-515.

A. ADEQUACY OF NOTICE

The GPTA provides that state and federal due process standards, rather than specific provisions of the act, govern the adequacy of notice under the act:

> It is the intent of the legislature that the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes satisfy the minimum requirements of due process required under the constitution of this state and the constitution of the United States but that those provisions do not create new rights beyond those required under the state constitution of 1963 or the constitution of the United States. The failure of this state or a political subdivision of this state to follow a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes shall not be construed to create a claim or cause of action against this state or a political subdivision of this state unless the minimum requirements of due process accorded under the state

> constitution of 1963 or the constitution of the United States are violated. [MCL 211.78(2).]

See also Republic Bank v Genesee Co Treasurer, 471 Mich 732, 737; 690 NW2d 917 (2005).

Due process protects a real estate owner's interest in property. *Dow v Michigan*, 396 Mich 192, 204; 240 NW2d 450 (1976). Due process requires that an owner be given proper notice and an opportunity to contest a state's claim to take the property for the owner's failure to pay taxes. *Id.* at 196. "[N]otice must be sent to an address reasonably calculated to apprise the object of notice of the pending proceedings, and this requirement must be evaluated in the context of affording the object of notice minimal due process." *Republic Bank*, *supra* at 739. As the United States Supreme Court has stated, " 'when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it[.]' " *Jones v Flowers*, 547 US 220, 229; 126 S Ct 1708; 164 L Ed 2d 415 (2006), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950); *Dow*, *supra* at 211.

In light of our Supreme Court's decision in *Sidun*, *supra*, and after reviewing the evidence presented below, we conclude that the notices sent to BankBoston were not reasonably calculated to apprise it of the forfeiture hearings. BankBoston recorded its assignment from Investaid, and this assignment provided its Boston address, at which it continued to maintain an office after its merger with Fleet. Fleet is a large international bank with offices all over the country. Given the sheer size of Fleet and the offices it undoubtedly assumed as a result of the merger, Fleet determined the address where notices should be sent. Even after the merger, plaintiff still maintained the BankBos-

ton address with the register of deeds as the proper place to receive notice regarding the property.

However, Title Check disregarded this address and instead chose to send notices to two Fleet addresses in Providence. It is unknown what relationship, if any, these Providence addresses had to either the property or the pending foreclosure. The notices sent were not reasonably calculated to apprise BankBoston of notice. Without any statutory authority, a foreclosing governmental unit lacks the power or discretion to determine the best business practices of private entities. On the basis of its own policies and procedures, BankBoston made the decision to provide its Boston address in the mortgage assignment. Plaintiff also listed the Boston address on the assignment recorded with the register of deeds and Fleet maintained that office at all times relevant to these proceedings. Defendants may not simply substitute their judgment with regard to where parties should receive notice. Through Title Check, defendants were aware of BankBoston's Boston address and failed to send notice to that address.

> Interested parties are "entitled to have the [government] employ such means 'as one desirous of actually informing [them] might reasonably adopt' to notify [them] of the pendency of the proceedings." *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976), quoting *Mullane*, *supra* at 315. That is, the means employed to notify interested parties must be more than a mere gesture; they must be means that one who actually desires to inform the interested parties might reasonably employ to accomplish actual notice. *Mullane, supra* at 315. [*Sidun*, *supra* at 509.]

Accordingly, a party that desires or is required to provide notice of forfeiture and foreclosure proceedings to an entity with an interest in the real property may not simply disregard the address provided by that entity to the

register of deeds. The Court of Claims did not err in concluding that defendants failed to satisfy due process.

B. PLAINTIFF'S ASSERTION OF LACK OF NOTICE

Defendants also contend that plaintiff is barred from asserting lack of notice. We disagree. MCL 211.78i(9) provides:

> The owner of a property interest who has been properly served with a notice of the show cause hearing under section 78j and the foreclosure hearing under section 78k and who failed to redeem the property as provided under this act shall not assert any of the following:
>
> (a) That notice was insufficient or inadequate on the grounds that some other owner of a property interest was not also served.
>
> (b) That the redemption period provided under this act was extended in any way on the grounds that some other owner of a property interest was not also served.

BankBoston was an owner of a property interest entitled to notice at the time the state was required to send notices and remained an owner of a property interest when it became the beneficial holder of the mortgage. Accordingly, under MCL 600.2041(1), plaintiff had standing to bring suit on BankBoston's behalf. Section 78 does not apply because plaintiff, as trustee of BankBoston, its beneficiary, had standing to pursue a due process claim against defendants, which failed to provide appropriate notice to satisfy due process. Because BankBoston did not receive statutorily required notice, defendants' argument is misplaced.

C. CONSTRUCTIVE NOTICE

Defendants also argue that due process was satisfied because the forfeiture certificate was recorded before the mortgage assignment from BankBoston to plaintiff. We disagree.

Michigan is a race-notice state, MCL 565.29; *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006), and a recorded interest in property takes priority over subsequent owners and encumbrances, MCL 565.25(4); *Ameriquest Mortgage Co v Alton*, 273 Mich App 84, 94; 731 NW2d 99 (2006). However, it does not follow that recording a certificate of forfeiture is reasonably calculated to apprise the interested parties of the pending foreclosure. Rather, the onus is on the foreclosing governmental unit to provide notice, and a party that records an instrument with the register of deeds is not required to determine whether anything has been filed regarding foreclosure. Again, as our Supreme Court has recently stated, "[a] party's ability to take steps to safeguard its own interests does not relieve the government of its constitutional obligation. *Sidun*, *supra* at 517. Had BankBoston and plaintiff received notice of the proceedings at the address recorded with the register of deeds, due process would have been satisfied.[5] See *Republic Bank*, *supra* at 742.

[5] Defendants' publication of the forfeiture proceedings was also insufficient to provide statutory notice:

> A notification method may be reasonable and constitutional if employing the method is reasonably certain to inform those affected," or, when circumstances do not reasonably permit such notice, if the method employed is not substantially less likely to provide notice than other customary alternative methods. *Mullane*, *supra* at 315. Notably, *Mullane* recognized that the reasonableness of a particular method could vary, depending on what information the government had. That case concerned a New York law that merely required notice by publication to inform beneficiaries of a common trust fund that the fund was subject to judicial settlement. *Id*. at 309-310. The Court held that while notice by publication was constitutionally sufficient with regard to beneficiaries whose interests or addresses were unknown, notice by publication was insufficient for beneficiaries whose names and addresses were known by the government. "Where the names and post-office addresses of those affected by a proceeding are at hand,

V. INTEREST

A. MCL 600.6455

In its cross-appeal, plaintiff argues that the Court of Claims erred by calculating interest based on MCL 600.6455(2) instead of subsection 1 because its interest in the property and its remedies were based on contract. We disagree. We review de novo questions of statutory interpretation. *Griffith*, *supra* at 525-526.

MCL 600.6455 provides, in pertinent part, as follows:

> (1) Interest shall not be allowed upon any claim up to the date of the rendition of judgment by the court, unless upon a contract expressly stipulating for the payment of interest. All judgments from the date of the rendition of the judgment shall carry interest at the rate of 12% per annum compounded annually, except that judgment upon a contract expressly providing for interest shall carry interest at the rate provided by the contract in which case provision to that effect shall be incorporated in the judgment entered. This subsection shall apply to any civil action based on tort filed on or after July 9, 1984 but before January 1, 1987 and any action pending before the court of claims on July 9, 1984. *This subsection shall apply to any action, other than a civil action based on tort, filed on or after July 1, 1984 and any action pending before the court of claims on July 9, 1984.*
>
> (2) *Except as otherwise provided in this subsection, for complaints filed on or after January 1, 1987*, interest on a money judgment recovered in a civil action shall be calculated from the date of filing the complaint at a rate of interest which is equal to 1% plus the average interest rate

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the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id*. at 318. Notice by publication was inadequate in the case of known beneficiaries "because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." *Id*. at 319. [*Sidun*, *supra* at 510-511.]

> paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section. [Emphasis added.]

Plaintiff maintains that its action was not based on a tort, and it seeks to use subsection 1 so that the interest on the judgment will be calculated using the rate provided in the mortgage contract. By its plain language, subsection 1 applies to any civil tort action filed before January 1, 1987, and to any other type of civil action filed on or after July 1, 1984. Subsection 2 applies to all actions filed on or after January 1, 1987. The action in the instant case was filed on April 7, 2003, and a violation of due process is a constitutional tort. See *Reid v Michigan*, 239 Mich App 621, 629; 609 NW2d 215 (2000) ("[T]ypically, a constitutional tort is committed by a governmental employee exercising discretionary powers so that constitutional rights personal to the plaintiff are thereby violated.") (internal quotation marks omitted). Although the underlying property interest arose from a contractual right, plaintiff's claim was based on a lack of due process, a constitutional tort, not the mortgage contract. Moreover, the interest plaintiff seeks was already recovered as part of the constitutional tort damages. Accordingly, the Court of Claims properly calculated interest under subsection 2.

B. CONTRACTS CLAUSE

Plaintiff claims that by operation of subsection 2, it has been denied the greater amount of interest that would have been due and payable under the promissory note. In light of this lesser amount of interest awarded, plaintiff argues that the contractual rate in the underlying promissory note and mortgage must be

respected to avoid violating the Contracts Clause of the federal and state constitutions. US Const, art I, § 10; Const 1963, art 1, § 10. We disagree. Because this issue was not raised in the Court of Claims, it is unpreserved and our "review is limited to determining whether a plain error occurred that affected substantial rights." *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007).

The Contracts Clause prohibition against any state law that impairs the obligations of contract is not absolute and must be "accommodated to the inherent police power of the State to safeguard the vital interest of its people." *Romein v Gen Motors Corp*, 436 Mich 515, 534; 462 NW2d 555 (1990) (internal quotation marks and citations omitted). The following three-pronged test was established to determine whether the state's police power is valid with respect to the Contracts Clause:

> The first prong considers whether the state law has operated as a substantial impairment of a contractual relationship. The second prong requires that legislative disruption of contractual expectancies be necessary to the public good. The third prong requires that the means chosen by the Legislature to address the public need be reasonable. [*Health Care Ass'n Workers Compensation Fund v Director of the Bureau of Worker's Compensation*, 265 Mich App 236, 241; 694 NW2d 761 (2005).]

See also *Romein*, *supra* at 534-536. With regard to the first prong, this Court has concluded that retroactive application of a statute relating to interest where the statue required an insurer to pay more interest than that for which it had contracted did not constitute a violation of the Contracts Clause. *Cosby v Pool*, 36 Mich App 571, 575, 578; 194 NW2d 142 (1971). Accordingly, because the situation here is substantially similar, no plain error occurred.

VI. UNCONSTITUTIONAL TAKING

Plaintiff argues that, because the subject property was sold for an amount well in excess of the taxes owed, the enforcement action here resulted in an unconstitutional taking without just compensation. Given our conclusion that the notices defendants sent to BankBoston failed to satisfy due process requirements, we need not address this issue.

Affirmed.

CAVANAGH, J., concurred.

O'CONNELL, J. (*dissenting*). I respectfully dissent. This is essentially a case of mistaken identity. Plaintiff is not BankBoston NA, which was the only entity that was even arguably owed, much less deprived of, due process by defendants. Exacerbating this fundamental mistake is the misunderstanding of two basic principles of law: the right to due process is a personal right that does not extend to third parties, and due process only requires *proper* notification of proceedings. Since the majority opinion acknowledges that notices were sent through registered mail, return receipt requested, to BankBoston, and receipt of those notices was acknowledged by signature, I am of the opinion that BankBoston received proper notice. I would reverse the decision of the trial court and remand for further proceedings.

As an initial matter, plaintiff fails to make out any claim that defendants violated any statutory obligation to provide it with notice of the tax forfeiture and foreclosure proceedings. Because the certificate of forfeiture was recorded before plaintiff's mortgage assignment, defendants were not statutorily required to provide plaintiff with notice. See MCL 211.78i(6)(a). However, the majority opinion claims, "BankBoston

was an owner of a property interest entitled to notice at the time the state was required to send notices and remained an owner of a property interest when it became the beneficial holder of the mortgage." *Ante* at 585. In my opinion, this statement does not have any support in the stipulated facts submitted below or in any law governing the sale and transfer of mortgage interests.

The mortgage assignment under which plaintiff claims its property interest expressly states that BankBoston transferred all its rights in the property to plaintiff as the trustee for the BankBoston Home Equity Loan Trust. Nothing in the lower court proceedings suggests that BankBoston's complete transfer of the mortgage to plaintiff left it with any residual status as "beneficial holder of the mortgage." On the contrary, the assignment was plenary and made for "valuable consideration." Therefore, BankBoston had no remaining interest in the property. In other words, BankBoston was, at most, the trust's settlor,[1] and nothing in the record verifies plaintiff's bald assertion that BankBoston and the trust were legally indistinguishable or the majority opinion's equally baseless assertion that BankBoston was the trust's beneficiary.[2]

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[1] It is entirely possible on the record before us that the "trust" was simply an administrative vehicle for transferring BankBoston's interests to First National Bank of Chicago, in which case, the only entity with a property interest would be FNB Chicago.

[2] Although plaintiff has not proffered any trust documentation to demonstrate its continued relationship with BankBoston, the transaction at issue has all the earmarks of a mortgage pool trust, and some of the documentary evidence presented fully supports this conclusion. A mortgage pool trust is a trust into which a lender may place its existing mortgages (good or bad) with an eye to selling certificates of beneficial interest to investors. Therefore, its beneficiary is the group of investors who have purchased an interest in the trust's pool, not the trust's settlor. See 6 Powell, Real Property, § 44A.06. Needless to say, this type of trust

In fact, BankBoston's disposition of its entire interest in the property and the property's mortgage explains why BankBoston, when it was adequately notified of the proceedings, took absolutely no action to claim any right under the mortgage. It also explains plaintiff's zealous pursuit of its claims as "trustee" of a trust corpus that the assumed "beneficiary" took no action to protect. The fact is that the only entity that had any proven interest in the mortgage was plaintiff First National Bank of Chicago. Unfortunately for this financial institution, its interest in the property was not "identifiable . . . before the date that the county treasurer record[ed] the certificate [of forfeiture]," so defendants simply were not required to send it notice of the foreclosure proceedings. MCL 211.78i(6).[3] Instead, it was incumbent upon plaintiff to review the register of deeds documents when it recorded its assignment,

would render the validity of BankBoston's notice irrelevant to plaintiff, and the mere possibility that the trust could have existed merely as a mortgage pool underscores how eagerly our courts, so far, have adopted every one of plaintiff's self-serving statements and granted to it rights that an ordinary assignee would never enjoy.

[3] This makes sense, because it puts the onus of discovering the compromised title on the person or entity that is considering whether the mortgage is worth buying, and at what price. That person has a much better opportunity to research the property's history and discover the delinquent taxes than the taxing authority has of detecting the "real" mortgage holder in a stream of serial, and sometimes artificial, financial transactions. This system relieves the unpaid taxing unit of the obligation to monitor, perpetually, the mortgage's progress as it drifts from financial institution to financial institution: sometimes openly traded and recorded, other times lying in wait among innumerable acquisitions, mergers, and financial dealings. In other words, a person speculating on a mortgage's value must research the value of the investment or bear the risk that the security (the real property) has already been forfeited for delinquent taxes or otherwise encumbered. It is not the government's responsibility to divine unrecorded property rights, chase down the real parties in interest, and drag them into court, with their eyes squeezed shut and their fingers stuck in their ears, so they can timely defend their own poorly researched investments.

which would have alerted it to the pending proceedings. Better still, it could have likely reviewed the available documents and discovered the property's tax arrearage before it gave any "Good and Valuable Consideration" to BankBoston and purchased the compromised mortgage. Because it failed to take either approach and essentially disregarded the costly and laborious record systems instituted to protect its rights in the property, I would not entertain plaintiff's claim that the government owed it still more effective forewarning that the property's taxes had not been paid.

In summary, there is no evidence that the single, isolated mortgage assignment imbued plaintiff with any continuing association with BankBoston, endowed it with any derivative entitlement to know BankBoston's affairs, or enabled it to raise BankBoston's legal claims, if any still existed.[4] Nevertheless, the majority opinion allows plaintiff to claim defects in BankBoston's notice as a justification for its own failure to defend itself against the foreclosure of its rights in the property.

[4] It is worth noting that plaintiff relies on the assignment to BankBoston to claim a lack of notice, but it does not rely on that assignment to claim that BankBoston was owed any money. Instead, plaintiff asserts BankBoston's assignment to the trust as the source of its own right to receive reimbursement from the property's tax-sale proceeds. BankBoston has never directly asserted any right to proceeds. Its assignment to plaintiff would clearly belie such a claim, and plaintiff would stand as one of its chief opponents. Nevertheless, plaintiff adds BankBoston's apparent right to notice with its own hopelessly tardy claim to the proceeds, and presents these two courses of a Barmecidal banquet as a constitutional excuse for its prolonged absence from the legal proceedings. I am not persuaded. The real shame is that the government, which finally collected its legitimate tax, wound up incurring more court costs to undo the original rulings, duplicating the entire process with the addition of plaintiff's long-dead claim, and paying plaintiff roughly $30,000 more in reimbursement than it received from the property's sale. This certainly does not accomplish the statute's purpose of encouraging governmental units to foreclose on properties that carry neglected tax obligations.

Recently, in *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005), we reiterated the fundamental concept that "constitutional rights are personal, and a person generally cannot assert the constitutional rights of others." "A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Fieger v Ins Comm'r*, 174 Mich App 467, 471; 437 NW2d 271 (1988). It follows "that the right to notice is personal and cannot be challenged by anyone other than the person entitled to notice." *In re AMB*, 248 Mich App 144, 176; 640 NW2d 262 (2001). Although plaintiff has firmly established BankBoston's right to notice, it has not made out a prima facie case that it was entitled to BankBoston's notice. Stated another way, plaintiff simply has no standing to assert BankBoston's right to notice.

Finally, the majority opinion reforms the long-established standards for providing due process by using hindsight to determine whether notice was adequate and by prejudging defendants' efforts and motives, using their overall success as the operative gauge. This is a flawed standard and an unreasonable approach to the analysis. Instead, "due process requires that the notice given be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 504; 536 NW2d 280 (1995).

In this case, defendants, through their agent, researched the registry and found BankBoston's interest in the property. It also diligently discovered that BankBoston no longer existed, because it had merged with Fleet National Bank. Therefore, it sent notice to the Providence, Rhode Island, address listed for BankBos-

ton (as absorbed into Fleet) on an official Federal Deposit Insurance Corporation (FDIC) website. Fleet, unquestionably responsible for BankBoston's previous affairs, acknowledged receipt of this notice on behalf of the recently dissolved entity.[5] All the parties agree that when the forfeiture certificate was actually filed and recorded at the register of deeds, Fleet was the proper entity to receive notice as the financial institution that inherited BankBoston's previous interests. Defendants later sent a separate notice directly to "BankBoston" through registered mail, return receipt requested, in accordance with additional information found on the FDIC website. Someone managing BankBoston's former interests acknowledged receipt of that notice, too. Interestingly, the same Fleet employee signed both return receipts. Nevertheless, nobody representing Fleet or BankBoston ever took any appreciable action in response to the foreclosure proceedings.[6]

Rather than subjecting this procedure to the test in *Vicencio*, the majority opinion holds that defendants violated plaintiff's constitutional rights by failing to send notice to the defunct, and apparently meaningless, address on the original assignment to BankBoston. Neither the majority opinion nor the lower court mentions that the address on the assignment was simply wrong. Not only was BankBoston fully integrated into Fleet and given a new address, the mortgage assignment from Investaid to BankBoston misprinted Bank-

[5] In fact, plaintiff presented an affidavit from the individual responsible for continuing the "BankBoston" address where plaintiff argues defendants should have sent the forfeiture notice. The affiant who continued the office was a Fleet employee.

[6] One could reasonably speculate that the reason BankBoston/Fleet took no action once they received notices of the foreclosure is because a search of their current mortgages revealed that they had transferred their interest in this mortgage to a third party.

Boston's original zip code. At the time of the assignment to BankBoston, BankBoston's offices were located within the zip code 02110, but the mortgage assignment recorded at the register of deeds erroneously showed BankBoston's zip code as 02210. Plaintiff concedes the flagrant defect in this address, but still insists that due process required defendants to send notice to this incorrect, and presumably invalid, address, because it was the only mailing address that was "reasonably calculated" to ensure that BankBoston would receive notice of the time-sensitive proceedings. Plaintiff's claim boils down to an argument that defendants should have ignored the best and most current information available and mailed BankBoston's notice to the wrong address. Only then, argues plaintiff, could defendants claim that they fulfilled their constitutional obligation of sending notice to an address "reasonably calculated" to actually notify BankBoston[7] of the pending action.

In sum, the majority opinion concludes that valid notice, sent and actually received at the current and

[7] As mentioned, because defendants' agent discovered that Fleet had merged with BankBoston and effectively acquired its interests, Fleet was actually the entity that possessed the relevant property interest when notice was due, adding another doubtful link to plaintiff's dubious chain of arguments. The record indicates that Fleet was the appropriate recipient of notice, whether directly or indirectly on BankBoston's behalf. Plaintiff's reliance on *Republic Bank v Genesee Co Treasurer*, 471 Mich 732, 741-742; 690 NW2d 917 (2005), is misplaced. The holding in *Republic Bank* absolved the government from undertaking extraordinary research to improve its chances of actually notifying an interested party, but it certainly did not deter the practice. See *id*. at 742. As in *Republic Bank*, the notices sent by defendants in this case reached the intended parties and actually informed them of the impending proceedings. If plaintiff acquired the mortgage before the forfeiture was filed, then defendants' ignorance of that fact is completely attributable to plaintiff's failure to record its interest in a timely fashion. If plaintiff did not acquire the interest until after the forfeiture was recorded, then the proper parties were given proper notice. Due process does not require more.

correct address of a record mortgage holder, is not reasonably calculated to give the mortgage holder notice of a pending action. It further concludes that this procedure violates the due process rights of a third party who either purchases the mortgage after the forfeiture was recorded or delays recording its purchase until the forfeiture was on record. Needless to say, I disagree. In my opinion, plaintiff simply fails to demonstrate either a legal right or its violation. I would reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

PEOPLE v TRAPP

Docket No. 282662. Submitted September 3, 2008, at Lansing. Decided September 9, 2008, at 9:05 a.m.

Joseph A. Trapp pleaded guilty in the Berrien Circuit Court of possession of child sexually abusive material. As part of the judgment of sentence, the court, Scott Schofield, J., ordered the defendant to pay $300 in costs for his appointed counsel. The defendant sought delayed leave to appeal, which the Court of Appeals denied. The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals to consider as on leave granted the issue whether the trial court was required to comply with the procedural safeguards of *People v Dunbar*, 264 Mich App 240, 251-256 (2004), in particular the requirement that the Court consider the defendant's present and future ability to pay those costs before ordering reimbursement. 481 Mich 889 (2008).

The Court of Appeals *held*:

Under *Dunbar*, a person who had counsel appointed can be ordered to reimburse the county for the costs of that representation, if reimbursement could be made without substantial hardship. A court need not make specific findings on the record regarding the defendant's ability to pay, but must provide some indication that it considered the defendant's financial situation before ordering reimbursement. The amount to be reimbursed must be related to the defendant's present and future ability to pay. The court must give the defendant notice and an opportunity to be heard before ordering payment. MCL 769.1k(b)(*iii*), which took effect on January 1, 2006, allows the court to order reimbursement of the expenses for a court-appointed attorney, but did not eliminate the *Dunbar* requirement that the trial court consider a defendant's ability to pay before ordering reimbursement. A remand for further proceedings is necessary in this case because the trial court gave no indication that it considered the defendant's present and future ability to reimburse the county.

Vacated in part and remanded.

CRIMINAL LAW — ATTORNEY AND CLIENT — COURT-APPOINTED ATTORNEYS — REIMBURSEMENT OF COSTS BY CRIMINAL DEFENDANTS.

A court must consider a defendant's present and future ability to pay before ordering the defendant in a criminal case to reimburse the expenses for court-appointed counsel (MCL 769.1k[b][*iii*]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Arthur J. Cotter*, Prosecuting Attorney, and *Aaron J. Mead*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Valerie R. Newman*) for the defendant.

Before: WHITBECK, P.J., and BANDSTRA and DONOFRIO, JJ.

PER CURIAM. Our Supreme Court has remanded this case for consideration as on leave granted. Defendant appeals that portion of the judgment of sentence requiring him to pay $300 for the cost of appointed counsel. We vacate that portion of the judgment and remand this matter for further proceedings. We have decided this appeal without oral argument, pursuant to MCR 7.214(E).

Defendant pleaded guilty of possession of child sexually abusive material, MCL 750.145c(4). The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to a term of two to six years in prison. The trial court also ordered defendant to pay statutory and court costs and $300 in appointed counsel costs.

This Court denied defendant's delayed application for leave to appeal, but our Supreme Court, in lieu of granting leave to appeal, remanded this matter for consideration of the issue whether the trial court, before ordering reimbursement of the cost of court-

appointed counsel, was required to consider defendant's present and future ability to pay those costs.

A person who was afforded appointed counsel might be ordered to reimburse the county for the costs of that representation, if such reimbursement could be made without substantial hardship. A court need not make specific findings on the record regarding the defendant's ability to pay, but must provide some indication that it considered the defendant's financial situation before ordering reimbursement. The amount to be reimbursed must be related to the defendant's present and future ability to pay. A court must afford the defendant notice and an opportunity to be heard before ordering payment of appointed counsel expenses. *People v Dunbar*, 264 Mich App 240, 251-255; 690 NW2d 476 (2004); MCR 6.005(B).

MCL 769.1k(1), which became effective on January 1, 2006, provides in pertinent part:

> If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> (a) The court shall impose the minimum state costs as set forth in [MCL 769.1j].
>
> (b) The court may impose any or all of the following:
>
> (*i*) Any fine.
>
> (*ii*) Any cost in addition to the minimum state cost set forth in subdivision (a).
>
> (*iii*) The expenses of providing legal assistance to the defendant.
>
> (*iv*) Any assessment authorized by law.

(*v*) Reimbursement under [MCL 769.1f].

This statute does not eliminate the requirement set forth in *Dunbar* that the trial court consider a defendant's ability to pay before ordering reimbursement of appointed counsel costs. See *People v Arnone,* 478 Mich 908 (2007).

Defendant failed to object to the order requiring him to pay attorney fees; therefore, our review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A review of the sentencing transcript shows that the trial court gave no indication that it considered defendant's ability to pay before ordering reimbursement.

Defendant asserts that he owes the county and the state more than $10,000 and maintains that he has no ability at present, and will have no ability in the future, to reimburse the county for the cost of his appointed counsel in this case. The trial court gave no indication that it considered any such information when ordering defendant to reimburse the county for the cost of appointed counsel. Therefore, a remand for further proceedings is necessary. *Dunbar*, *supra* at 251-255.

We vacate that portion of the judgment of sentence requiring defendant to pay the county $300 for the cost of his appointed counsel and remand this matter to the trial court for consideration of defendant's present and future ability to reimburse the county for the cost of representation.

An evidentiary hearing is not required on remand. The trial court may rely on an updated report from the probation department. See *id*. at 255 n 14. If the trial court concludes that the reimbursement requirement should be eliminated or modified, it should enter an amended judgment of sentence to that effect. MCL

769.1k(b)(*iii*) provides legislative authorization for an order requiring payment of fees for a court-appointed attorney; therefore, such an order may be made part of the judgment of sentence, if appropriate.

We affirm the judgment in all other respects. We do not retain jurisdiction.

CRYSTAL LAKE PROPERTY RIGHTS ASSOCIATION
v BENZIE COUNTY

Docket No. 272587. Submitted February 6, 2008, at Lansing. Decided September 11, 2008, at 9:00 a.m. Leave to appeal sought.

The Crystal Lake Property Rights Association, composed of owners of property near Crystal Lake, brought an action in the Benzie Circuit Court against Benzie County and the Department of Natural Resources (DNR), seeking declaratory and injunctive relief against the construction of a public boat launch on Crystal Lake and near the Betsie Valley Trail. The plaintiff alleged that the boat launch would be in violation of a Benzie County ordinance governing the Betsie Valley Trail, as well as the terms of the settlement agreement that disposed of a class action by certain property owners against the Department of Transportation concerning the trail. The court, James M. Batzer, J., granted summary disposition for the DNR, agreeing with the DNR that it only had to comply with MCL 324.78114, and therefore was not subject to the county ordinance, in constructing the boat launch, and that the boat launch was not prohibited under the terms of the settlement agreement. The plaintiff appealed.

The Court of Appeals *held*:

1. Legislative intent is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances. It is not necessary for the Legislature to use any particular talismanic words to indicate its intent with regard to a zoning exemption. Nothing in MCL 324.78114, which governs the acquisition of land by the DNR for use as public-access boat launches, indicates that the DNR has exclusive jurisdiction over the placement of public-access boat launches. MCL 324.78114 can be reasonably construed as merely requiring the DNR to follow specific procedures to involve local government in creating a public-access boat launch. Accordingly, the DNR is not exempt from local zoning ordinances when establishing a public-access boat launch.

2. The settlement agreement does not preclude the DNR from building the proposed boat launch. By acquiring property that abuts the trail, the DNR became an adjoining property owner

under the terms of the settlement and is entitled to the same rights as other adjoining property owners, including access and use rights to the trial in any way that does not conflict with the trail easement as specified in the settlement agreement.

Affirmed in part, reversed in part, and remanded for further proceedings.

MURRAY, J., concurred with the majority's decision, but expressed his belief that the DNR violated the spirit, intent, and purpose of the trail-use plan incorporated in the settlement agreement. Under that plan, the DNR may not ease or eliminate any limitations or restrictions of the plan. One such restriction is that nonresident trail users are to enter the trail only at two specified trail-heads. The proposed public-access boat launch will lead to an access point not contemplated by the plan.

MUNICIPAL CORPORATIONS — ORDINANCES — PUBLIC-ACCESS BOAT LAUNCHES — DEPARTMENT OF NATURAL RESOURCES.

The Department of Natural Resources is not exempt from local ordinances when establishing public-access boat launches (MCL 324.78114).

Gockerman, Wilson, Saylor & Hesslin, P.C. (by *Richard M. Wilson, Jr.*), for the Crystal Lake Property Rights Association.

David J. Bedells, P.C. (by *David J. Bedells*), for Benzie County.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Harold J. Martin*, Assistant Attorney General, for the Department of Natural Resources.

Before: MARKEY, P.J., and METER and MURRAY, JJ.

METER, J. This case involves a proposal by defendant Department of Natural Resources (DNR) to construct a public-access boat launch on Crystal Lake in defendant Benzie County. Plaintiff, Crystal Lake Property Rights Association, is composed of owners of property in the

vicinity of the proposed boat launch, and it sued to stop the construction of the boat launch. The trial court, in granting the DNR's subsequent motions for summary disposition, rejected plaintiff's attempt to stop the construction. Plaintiff appeals as of right, and we affirm in part, reverse in part, and remand for further proceedings. We hold that the DNR's project is subject to the county zoning ordinance, despite the DNR's compliance with MCL 324.78114, a provision of the waterways commission act, MCL 324.78101 *et seq*., contained in part 781 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. We also hold that an earlier settlement involving a trail running adjacent to Crystal Lake does not prohibit the proposed boat launch.

I. BACKGROUND FACTS

In October 1996, a settlement was reached in a class action brought by certain property owners against the Michigan Department of Transportation (DOT) with respect to their claim of title to a railroad right-of-way running along the south shore of Crystal Lake. Under the settlement, the DNR was entitled to a permanent easement for a ten-foot-wide public trail, subject to limitations and restrictions set forth in the settlement and the DOT's superior right to resume rail use within the easement. The trail, a segment of a larger trail known as the Betsie Valley Trail, was to be "operated and used in a manner that does not disrupt the lives of the adjoining property owners or diminish their opportunity to use and enjoy the waterfront or place unreasonable restrictions on use of the trail by the public." In November 1996, the trial court entered a judgment based on the settlement.

In late 2001 and early 2002, the DNR took steps to acquire property fronting Crystal Lake for a public-access boat launch on land that abuts the Betsie Valley Trail. Under the DNR's plan, boaters would drive to the property, back up their vehicles and trailers to launch their boats into the lake, and then park the vehicles and trailers in a parking lot. The plan provided for four launch ramps and 100 parking spaces. Other planned features included a staging area with benches, toilets, and bicycle racks. It was anticipated that some individuals using the Betsie Valley Trail would stop at the planned facility, but the intent was to have the planned facility serve as a boat launch.

In May 2002, the state acquired 20 acres of property to be used for the boat launch. Earlier, between December 2001 and February 2002, the Benzie County Board of Commissioners and the Benzonia Township Board expressed approval of the development, but had no interest in acquiring the land. In May 2004, the Michigan Department of Environmental Quality (DEQ) issued a permit to the DNR to allow construction of a "public boat launch." The permit specified, in part, that it did not waive the necessity of seeking "federal assent [and] all local permits or complying with other state statutes."

In June 2004, plaintiff filed the instant action for declaratory and injunctive relief against Benzie County and the DNR. Plaintiff alleged in counts I and II of its amended complaint that Benzie County violated the former County Zoning Act, MCL 125.201 *et seq*.,[1] and due process and equal protection rights by allowing

[1] Effective July 1, 2006, the County Zoning Act and other zoning acts were repealed by 2006 PA 110 and replaced by the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*. MCL 125.3702 lists the repealed acts, but provides in subsection 2:

property acquired by governmental units to be rezoned to district "G," a designation that permits the governmental unit to determine the appropriate land use without a public hearing. Count III alleged that the DNR violated the earlier settlement. Count IV alleged that the DNR violated a Betsie Valley Trail ordinance adopted by Benzie County in 2002. Count V alleged that the proposed public boating access site would violate the Michigan environmental protection act, MCL 324.1701 *et seq*., but conceded that an administrative proceeding on this claim was pending.[2]

The DNR moved for summary disposition before the filing of the amended complaint. It argued that plaintiff's challenge to the district "G" provisions in Benzie County's zoning ordinance was baseless and, in any event, it was not subject to the zoning ordinance pursuant to MCL 324.78114. Further, the DNR argued that it did not violate the earlier settlement or the Betsie Valley Trailway ordinance. Benzie County later joined in the DNR's motion, but declined to stipulate that the DNR is not subject to county zoning ordinances.

Plaintiff then moved for partial summary disposition with respect to whether the DNR's proposed public-access boat launch is subject to local zoning control. The trial court determined that the evidence established that the DNR had complied with MCL 324.78114. It

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> This section does not alter, limit, void, affect, or abate any pending litigation, administrative proceeding, or appeal that existed on June 30, 2006 or any ordinance, order, permit, or decision that was based on the acts repealed under subsection (1). The zoning ordinance need not be readopted but is subject to the requirements of this act, including, but not limited to, the amendment procedures set forth in this act.

[2] Count V was dismissed without prejudice so that plaintiff could pursue administrative remedies. It is not at issue in this appeal.

mentioned, in dicta, that Benzie County's zoning ordinance was unconstitutional with respect to district "G," but held that the zoning ordinance simply did not apply to the DNR as long as it complied with MCL 324.78114. It granted the DNR's motion with respect to counts I and II. During later proceedings, it also granted summary disposition to the DNR with respect to counts III and IV.

II. THE DNR'S PROJECT IS SUBJECT TO LOCAL ZONING

Plaintiff argues that the trial court erred in ruling that the DNR was exempt from local zoning ordinances. We review a trial court's decision to grant summary disposition de novo and do the same for the interpretation and application of a statute. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 243; 704 NW2d 117 (2005).

In *Burt Twp v Dep't of Natural Resources*, 459 Mich 659, 661, 664; 593 NW2d 534 (1999), the Supreme Court held that the DNR was required to comply with the local zoning ordinance, which had been adopted pursuant to the former Township Rural Zoning Act (TRZA), MCL 125.271 *et seq*., in constructing a public-access boat launch. It declined to hold that the NREPA exempted the DNR from local zoning laws. *Burt Twp*, *supra* at 671. In the present case, the trial court held that 1998 PA 210, which enacted MCL 324.78114, a provision of the NREPA, "implicitly overruled" *Burt Twp*.[3] The trial court concluded that as long as the DNR complied with MCL 324.78114, it could construct a public-access boat launch without being subject to the local zoning ordinance.

[3] 1998 PA 210 was enacted before *Burt Twp* was decided. However, the amendments were not applicable to *Burt Twp* because of their effective date. See *Burt Twp*, *supra* at 668 n 9.

In *Burt Twp*, *supra* at 663, the Court, quoting *Dearden v Detroit*, 403 Mich 257, 264; 269 NW2d 139 (1978), indicated that " 'the legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances.' " The Court ultimately concluded:

> In sum, the NREPA and the TRZA appear to provide coextensive statutory rights concerning the protection of natural resources in general and the development of recreation facilities and other waterfront developments in particular. Moreover, nothing in the NREPA establishes a clear expression of legislative intent to exempt the DNR's activities in this case from the Burt Township zoning ordinance. Accordingly, for all the reasons stated, we hold that the DNR, in the construction of its public-access boat launch, is subject to Burt Township's zoning ordinance. The decision of the Court of Appeals is affirmed. [*Burt Twp*, *supra* at 671.]

1998 PA 210 added the following language to the NREPA:

> (1) Prior to acquiring a public boating access site, the department shall obtain a 90-day option on the land proposed for acquisition. In obtaining this option, the department shall attempt to negotiate an option that may be transferred to a local unit of government. Upon placing the option on the land, the department shall notify the municipality and the county in which the land is located of the option and whether the department plans to hold a public hearing on the proposed purchase and development of the land as a public boating access site. The municipality or county in which the proposed public boating access site is located may hold a public hearing on the proposed purchase and development of the land as a public boating access site. If a municipality or county holds a public hearing under this subsection, the municipality or county shall notify the department, and a representative of the department shall attend the public hearing.

(2) During the 90-day period in which the department holds an option under subsection (1), the municipality or county in which the land is located may do either of the following:

(a) Notify the department that it intends to operate a public boating access site on that land. If the department receives a notice pursuant to this subdivision, the department shall transfer the option, if possible, to the municipality or county so that it may exercise the option and purchase the land. If the municipality exercises the option and purchases the land, the exercise of the option shall be contingent upon the municipality or county and the department entering into a legally enforceable agreement that specifies how the public boating access site will be operated. The agreement shall provide that the public boating access site will be operated in the same manner as a public boating access site that is operated by the department, unless the department agrees to alternative terms. The agreement shall also provide that if the municipality or county violates the agreement, the department may operate the public boating access site in compliance with the agreement.

(b) Identify another suitable location on the lake that the department could acquire for a public boating access site. The public boating access site shall be comparable for development as the one proposed by the department. [MCL 324.78114.]

The DNR argues, and the trial court held, that this amendatory language evidences a legislative intent to exempt the DNR from local zoning laws. We disagree. It is true that in *Burt Twp*, *supra* at 669, the Court stated that it was not necessary that the Legislature use "any particular talismanic words to indicate its intent [with regard to a zoning exemption]. The Legislature need only use terms that convey its clear intention that the grant of jurisdiction given is, in fact, exclusive." However, we find no language within MCL 324.78114 or, for that matter, within the rest of 1998 PA 210, indicating

that the DNR has exclusive jurisdiction in the placement of public-access boat launches. Significantly, MCL 324.78114(2)(a) does not purport to exempt the DNR from local zoning requirements, but only requires that the site be operated in a manner agreed to by the parties. Zoning ordinances are concerned with the use of property. *Dearden v Detroit*, 403 Mich 257, 267; 269 NW2d 139 (1978). Further, there is nothing in MCL 324.78114 that requires the DNR to exercise the option to purchase property, regardless of what the local unit of government elects to do. However, at the end of the 90-day option process, the DNR should know how its proposal is viewed in the municipality or county and what steps would be necessary for it to pursue the matter further. MCL 324.78114 can be reasonably construed as merely requiring that the DNR, in creating a public-access boat launch, follow specific procedures to involve local government.

In addition, the Legislature, when passing laws, is presumed to be aware of judicial interpretations of existing law. *Ford Motor Co v Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006). There is nothing in the amendatory act that establishes a clear expression of legislative intent to modify this Court's conclusion in *Burt Twp* (before it was affirmed by the Supreme Court)[4] that the NREPA did not serve to exempt the DNR from the local zoning ordinance.

This case differs from *Byrne v Michigan*, 463 Mich 652, 657-658, 660; 624 NW2d 906 (2001), in which the Supreme Court found that legislation enacted after a judicial decision to enjoin the Michigan State Police from constructing a communications tower clearly expressed a legislative intent to exempt the Michigan

[4] See *Burt Twp v Dep't of Natural Resources*, 227 Mich App 252, 258-260; 576 NW2d 170 (1997).

State Police from local zoning ordinances. Similar to the amended act at issue in this case, MCL 28.282 (the statute at issue in *Byrne*) entitles a local unit of government to notice of the site selection. *Byrne*, *supra* at 660. However, unlike in this case, the Legislature in MCL 28.282 required that the local unit of government have zoning authority and specified a clear outcome, namely, that the Michigan State Police "may proceed with construction" in the event that the local unit of government does not grant a special use permit or propose an alternative, workable site. *Byrne*, *supra* at 660-661.

The present case also differs from *Dearden*, *supra* at 265-267, in which our Supreme Court determined that the Legislature's use of language in the corrections code, MCL 791.201 *et seq.*, such as "exclusive jurisdiction," MCL 791.204, and the broad vesting of powers in the Michigan Corrections Commission over "all matters related to the unified development of the penal institutions," former MCL 791.202, were evidence that "the Legislature intended to grant the Department of Corrections immunity from local zoning ordinances when establishing state penal institutions." Similarly, in *Northville Charter Twp v Northville Pub Schools*, 469 Mich 285, 290-291 (TAYLOR, J., joined by CORRIGAN, C.J., and YOUNG, J.), 298-299 (CAVANAGH, J., joined by KELLY, J.), 302 (WEAVER, J.); 666 NW2d 213 (2003), there was "sole and exclusive jurisdiction" language in MCL 380.1263; the Supreme Court considered this language in holding that the state superintendent of public instruction has sole and exclusive jurisdiction over school construction and site plans and is not subject to local zoning ordinances. Also, in *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 703, 711; 664 NW2d 193 (2003), the Court, in determining whether the defendant was required to comply with local zoning ordi-

nances in selecting the site of a homeless shelter, emphasized that MCL 46.11 empowers a county board of commissioners to determine the site of county buildings, with only one limitation, relating to "any requirement of law that the building be located at the county seat." The Court concluded that the Legislature intended no other limitation. *Pittsfield Charter Twp*, *supra* at 711. A similar situation is not present in the instant case.

There is simply no basis for concluding that the DNR is exempt from local zoning ordinances if it complies with MCL 324.78114, and therefore we reverse the trial court's ruling.[5]

III. THE EARLIER SETTLEMENT DOES NOT PROHIBIT THE PROPOSED BOAT LAUNCH

Plaintiff next contends that the trial court erred in granting summary disposition with regard to its claim that the final judgment in the earlier lawsuit prohibits construction of the DNR's proposed boat launch. Specifically, plaintiff asserts that the proposed boat launch would violate the settlement reached in that lawsuit by allowing non-boaters to enter the trail from the boat launch, by having bicycle racks and other amenities in anticipation that trail users will be present, and by creating a new public access area to the lake from the trail. The DNR counters that because it acquired property adjoining the trail, its use of that property to

[5] We remand this case for further proceedings. Although the trial court expressed disapproval of the portion of Benzie County's zoning ordinance relating to district "G," we conclude that it did not conclusively render declaratory relief with respect to the constitutionality of the ordinance; it essentially concluded that the issue was moot. This conclusion is bolstered by the fact that the parties do not address the substance of this issue in their appellate briefs. Presumably, this will be an issue the parties will revisit on remand.

provide a boat launch is protected under the portion of the settlement governing "adjoining property owners."

We affirm the lower court's decision. Settlement agreements are generally construed in the same manner as contracts. *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484; 637 NW2d 232 (2001). "The primary goal of contract interpretation is to enforce the parties' intent." *Chestonia Twp v Star Twp*, 266 Mich App 423, 432; 702 NW2d 631 (2005) (citation and quotation marks omitted).

The settlement provided that "all adjoining property owners, their guests and invitees shall at all times have free and direct access over the trail easement on their respective properties." It further provided that property owners could use their property in any way "not inconsistent with said easement."

The settlement also included a "Special Trail Use and Law Enforcement Plan" (the Plan) to govern the use of the trail easement by any person; the Plan was to be enforced by the DNR, Benzie County, and local organizations. The settlement acknowledged that the DNR's enforcement duty lay "primarily in controlling usage by the general public and not the usage of adjoining property owners, their guests or invitees." The Plan's stated purpose was to ensure that the trail would be used in a manner that "does not disrupt the lives of the adjoining property owners or diminish their opportunity to use and enjoy the waterfront or place unreasonable restrictions on use of the trail by the public." The Plan set forth a series of special restrictions on the trail, two of which are pertinent to this appeal:

> Except for adjacent property owners, trail users must stay on the trial surface and shoulders. Entrance to this portion of the trail by non-resident trail users shall be only

> at the trail-heads at Benzie Boulevard/Spring Valley Drive in the Village of Beulah on the east, at Mollineaux Road on the west, or other designated public access areas. Trailhead parking will be designated, with appropriate signage, at the two trailheads.
>
> * * *
>
> There will be no toilet facilities, drinking fountains, telephones, picnic tables, no hunting, fishing, camping, picnicking or vending and no public access to the Crystal Lake waterfront or docks except as specifically allowed in designated public areas.

Plaintiff contends that construction of the boat launch would violate these two restrictions by essentially creating a new public access area, without any amendment of the agreement. In ruling on this argument below, the trial court found that the special restrictions in the Plan applied only to the trail and not to adjacent land. The court acknowledged that although the DNR was not prohibited by the settlement from constructing a boat launch on its property, it would still have to control public use of the trail from the launch. The court presumed that public officials would perform that responsibility properly.

We agree with the trial court's analysis that the settlement does not preclude the DNR from building the proposed boat launch. By acquiring property that abuts the trail, the DNR became an adjoining property owner under the settlement and is entitled to the same rights as other property owners, because the settlement provides no exception for governmental entities that become landowners. As an adjoining landowner, the DNR may allow its own guests and invitees to access that part of the trail located on its property and use its property in any way that does not conflict with the trail

easement. The restrictions within the Plan apply only to the trail itself, and not to the activities of adjoining landowners.

Also, we do not find that the DNR's boat launch would create a new "designated public area." According to the Plan's use of the term, designation occurs when an area is specified for particular uses and signage is authorized to communicate the designation to trail users. There is simply no evidence that the proposed boat launch will be marked by the DNR for any use associated with the trail. Plaintiff does question whether the DNR will be able to control trail usage associated with the boat launch so that it does not interfere with the rights of neighboring property owners. However, "[i]t is presumed that public officers perform their official duties." *Glavin v State Hwy Dep't*, 269 Mich 672, 675; 257 NW 753 (1934).

The trial court correctly determined that the earlier settlement does not prohibit the proposed boat launch.

Affirmed in part, reversed in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

MARKEY, P.J., concurred.

MURRAY, J. (*concurring*). I concur with the majority's decision. I am not convinced that what the Department of Natural Resources has done is in violation of the technical terms of the amended settlement agreement,[1] and it is our judicial duty to enforce the plain language of the agreement. However, this result does not sit well with me because, after reading the entire Special Trail Use and Law Enforcement Plan incorporated in the

[1] The agreement also had attached and incorporated to it a Special Trail Use and Law Enforcement Plan.

agreement, it seems clear to me that the DNR is violating the spirit, intent, and purpose of the plan, albeit not its plain language.

As detailed in the majority opinion, in 1996 the parties entered into an agreement that resolved their dispute and set forth in great detail the respective rights, duties, and obligations of the parties to the agreement. A settlement agreement is construed like a contract, *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994), and therefore it must be " ' "construed so as to give effect to every word or phrase as far as practicable." ' " *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003), quoting *Hunter v Pearl Assurance Co Ltd*, 292 Mich 543, 545; 291 NW 58 (1940), in turn quoting *Mondou v Lincoln Mut Cas Co*, 283 Mich 353, 358-359; 278 NW 94 (1938).

As the agreement recognizes, the primary duty of the DNR is to control usage of the trail by the *general public*, and to not control "the usage of adjoining property owners, their guests and invitees." The agreement specifically provides that the DNR "may under no circumstances ease or eliminate any limitations or restrictions imposed by the Plan, except through amendment of the Plan in the manner specified by the Plan." With respect to limitations and restrictions, section D, subsection 3, indicates the following restrictions on public access to the trail[2]:

> Except for adjacent property owners, trail users must stay on the trail surface and shoulders. *Entrance to this portion of the trail by non-resident trail users shall be only at the trail-heads at Benzie Boulevard/Spring Valley Drive*

[2] The agreement indicates that the trail will be 10 feet wide, with an eight-foot wide portion for use with a one-foot berm on each side of the trial. Thus, the actual portion of the trail to be used by the public and adjoining landowners for bicycling, hiking, etc., is eight feet wide.

> *in the village of Beaulah on the east, at Mollineaux Road on the west, or other designated public access areas*. Trailhead parking will be designated, with appropriate signage, at the two trailheads.

As already noted, I do not doubt the DNR's ability, as a property owner, to use its property as it sees fit, as long as it is consistent with local zoning ordinances and the plan. And I do not doubt the credibility of the DNR officials who indicate that signs will be posted at the launch to inform the public that the trail is not accessible from that location. However, it is certainly likely that the public, when using the boat launch, which has a large parking lot, bicycle rack, and other facilities, will decide to use the trail from that location rather than driving off to another location and getting on the same trail. In other words, although we must presume that the public will obey the law, see *United States v Norton,* 97 US 164, 168; 24 L Ed 907 (1877), and *DeVries v Owens,* 295 Mich 522, 525; 295 NW 249 (1940), we also know that many will either conveniently ignore a sign, or simply miss the sign, and enter the trail. Thus, without being able to set aside some well-founded skepticism, it seems to me that establishment of the public boat launch will create a third public access point. And, although not in violation of the plain terms of the agreement, the end result is disappointing in that it arises from the state agency that is to restrict public access to the trail as outlined in the plan.[3]

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[3] Although not raised by the parties, it also seems to me that the undefined terms "public" and "guests and invitees" are not synonymous, but instead refer to different groups. The plan envisions the DNR controlling public access to the trail, while leaving alone adjoining property owners and their guests and invitees. Throughout the plan there are references to the "public" and "public access," which I take to be a reference to the general public, the masses. The reference is usually

made in regard to where non-property owners, or those who are not guests or invitees of property owners, can access the trail. But, after the DNR's actions, the "public" is now considered the same as a private property owner's "guests or invitees."

EMPSON-LAVIOLETTE v CRAGO

Docket No. 284041. Submitted September 4, 2008, at Grand Rapids. Decided September 11, 2008, at 9:05 a.m. Leave to appeal denied, 482 Mich 1077.

Shannon and Tricia Scott petitioned the Van Buren County Probate Court for guardianship of Z.E., a member of the Pokagon Band of Potawatomi Indians. The petition was accompanied by written consents by Z.E.'s parents, Stephanie Empson-Laviolette and Nathaniel R. Crago. The court, Frank D. Willis, J., appointed the Scotts as temporary guardians. Empson-Laviolette petitioned the court to terminate the guardianship and return Z.E. to her, claiming that her consent to the guardianship had been obtained by fraud. The Scotts sought sole custody of the child in the Van Buren Circuit Court, and Empson-Laviolette, relying on § 1913(b) of the Indian Child Welfare Act (ICWA), 25 USC 1913(b), sought the return of Z.E. to her custody. The circuit court, Frank D. Willis, J., granted sole custody of Z.E. to the Scotts, ruling that the ICWA did not apply to the guardianship and custody proceedings. Empson-Laviolette appealed.

The Court of Appeals *held*:

1. 25 USC 1913(b) provides that any parent or Indian custodian of an Indian child may withdraw consent to a foster care placement under state law at any time and that, upon such withdrawal, the child shall be returned to the parent or Indian custodian. 25 USC 1903(1) defines "foster care placement" to include removal of an Indian child from its parent and placement in the home of the child's guardian. The ICWA applied to the guardianship proceeding and the probate court erred when it failed to return Z.E. to Empson-Laviolette after she revoked her consent to the Scotts' guardianship of Z.E.

2. MCL 722.26b(4) provides for a stay of guardianship proceedings in the probate court when the child's guardian brings a child custody action in the circuit court. Because MCL 722.26b(4) is an obstacle to providing Empson-Laviolette the minimum protections afforded by the ICWA, it is preempted by the ICWA. Accordingly, upon receiving Empson-Laviolette's petition to terminate the Scotts' guardianship of Z.E., the probate court should have lifted

the stay and addressed the merits of the petition seeking Z.E.'s return to Empson-Laviolette's custody pursuant to 25 USC 1913(b).

Order granting custody to the Scotts vacated; case remanded for termination of the Scotts' guardianship and a return of Z.E. to Empson-Laviolette's custody.

1. INDIANS — INDIAN CHILD WELFARE ACT — WITHDRAWAL OF CONSENT TO FOSTER CARE PLACEMENT.

A parent of an Indian child can withdraw consent to a foster care placement under state law at any time and have the child returned to that parent (25 USC 1913[b]).

2. INDIANS — INDIAN CHILD WELFARE ACT — WITHDRAWAL OF CONSENT TO FOSTER CARE PLACEMENT — GUARDIANSHIPS — STAY OF PROCEEDINGS.

The statute that provides for a stay of guardianship proceedings when the child's guardian brings a child custody action in the circuit court is preempted by the Indian Child Welfare Act when a parent of an Indian child withdraws consent to guardianship and seeks a return of the child (25 USC 1913[b]; MCL 722.26b[4]).

Michigan Indian Legal Services, Inc. (by *Thomas R. Myers*), for the plaintiff.

Schuitmaker, Cooper, Schuitmaker, Cypher & Knotek, P.C. (by *Theresa J. Cypher*), for the defendant.

Before: METER, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM. Plaintiff, Stephanie Empson-Laviolette (Empson), an enrolled member of the Pokagon Band of Potawatomi Indians (Tribe), appeals by right the trial court's order granting sole custody of her son, Z.E., to appellees Shannon and Tricia Scott. Below, pursuant to the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, Empson moved the trial court to dismiss the Scotts' motion for custody and to return Z.E. to her custody because she had withdrawn her consent to the Scotts' guardianship of Z.E. Because the ICWA allows the parent of an Indian child who consents to a foster

care placement of the child to withdraw consent to the placement at any time and to have the child returned to the parent's custody, we agree with Empson that she was entitled to have Z.E. returned to her custody. Therefore, we vacate the trial court's order granting custody of Z.E. to the Scotts and remand this case for an order terminating the Scotts' guardianship of Z.E. and for the effectuation of the return of Z.E. to Empson.

I. BASIC FACTUAL AND PROCEDURAL HISTORY

On July 21, 1996, Z.E. was born to Empson and defendant Nathaniel Crago. It is undisputed that Z.E., like his mother, is an enrolled member of the Tribe.

On August 16, 2004, Shannon and Tricia Scott filed a petition for guardianship of Z.E.[1] The box next to question 5 of the petition, which read, "The minor is a member of/eligible for membership in an American Indian tribe/band," was not checked. Consent waivers to the guardianship signed by Empson and Crago accompanied the Scotts' petition. On August 31, 2004, the trial court appointed the Scotts temporary guardians of Z.E.[2] The guardianship order specifically stated that Z.E.'s custody could not be changed from the Scotts without the consent and order of the trial court.

On December 1, 2004, Empson, claiming that her consent to the Scotts' guardianship of Z.E. had been

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[1] Before living with the Scotts, Z.E. lived with his maternal grandparents, Empson's parents. Empson placed Z.E. in the care of the Scotts in the summer of 2004 after allegations arose that her father had abused Z.E.

[2] We recognize that the guardianship proceedings were before the probate court, see MCL 700.1302(c), which provides that a probate court has exclusive jurisdiction over guardianship proceedings, and that the subsequent custody proceedings were before the circuit court. However, because the probate judge presided over the custody proceedings, see MCL 722.26b(5), we refer to the probate court and the circuit court as the trial court.

fraudulently obtained, moved to terminate the guardianship and to have Z.E. returned to her custody. Empson's motion contained no indication that Z.E. was Native American. On February 2, 2005, the Scotts moved for sole custody of Z.E.[3] The trial court subsequently stayed the guardianship proceedings. It ordered that the Scotts were to remain Z.E.'s guardians until further order of the court.

Several months later, on August 15, 2005, Empson filed a second petition to terminate the Scotts' guardianship of Z.E. This petition provided the first notice to the trial court that Z.E. was Native American. It stated that Z.E.'s race was "Native American." The trial court denied the petition because the guardianship proceedings had been stayed pending the resolution of the Scotts' motion for custody.

Testimony on the Scotts' motion for custody of Z.E. commenced in January 2006. After Empson testified, the trial court adjourned the hearing in order that the submitted psychological evaluation report could be amended to include the Scotts. The trial court did not hear further testimony on the Scotts' motion for custody until February 2008.

In the meantime, Empson moved the trial court to dismiss the Scotts' motion for custody. Empson asserted that because Z.E. was Native American, the ICWA governed the proceedings. She contended that because the Scotts' motion effectively removed Z.E. from her custody and because the heightened standards under 25 USC 1912(d) and (e) regarding the removal of an Indian child from the care of a parent or Indian custodian had not been satisfied, the Scotts' motion had to be dismissed. Empson also moved for the return of Z.E. to her

[3] Crago consented to the Scotts' motion for custody of Z.E.

custody. She claimed that the return of Z.E. to her custody was mandated by 25 USC 1913(b), which allowed her to revoke her consent to the Scotts' guardianship of Z.E. The trial court denied the motions. It held that because the guardianship proceedings were initially consensual, the ICWA did not apply to the guardianship proceedings. The trial court further held that because the Scotts were the guardians of Z.E., the Scotts' motion for custody of Z.E., if granted, would not remove Z.E. from the custody of Empson. Therefore, according to the trial court, the ICWA did not apply to the custody proceedings.

In February 2008, after hearing further testimony on the Scotts' motion for custody, the trial court granted sole custody of Z.E. to the Scotts.

II. STANDARD OF REVIEW

Issues involving application of the ICWA present questions of law that we review de novo. *In re Fried*, 266 Mich App 535, 538; 702 NW2d 192 (2005); *In re NEGP*, 245 Mich App 126, 130; 626 NW2d 921 (2001). Issues of statutory interpretation are also questions of law that we review de novo. *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007). When interpreting a federal statute, our goal is to give effect to the intent of Congress. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008).

III. ISSUES ADDRESSED ON APPEAL

On appeal, Empson argues that the trial court erred by holding that the ICWA did not apply to either the guardianship proceedings or the custody proceedings and that the trial court violated the ICWA at various times throughout the proceedings. We do not address all

of Empson's arguments on appeal because we agree with Empson that the ICWA applied to the guardianship proceedings and that the trial court violated the ICWA when it failed to return Z.E. to her custody after she revoked her consent to the Scotts' guardianship of Z.E. To reach this conclusion, we were required to address the following three issues: (1) whether the ICWA applied to the guardianship proceedings, (2) whether Empson was allowed to withdraw her consent to the Scotts' guardianship of Z.E., and (3) whether the ICWA preempted the stay mandated by MCL 722.26b(4).

IV. THE INDIAN CHILD WELFARE ACT

In adopting the ICWA, Congress sought to establish "minimum Federal standards for the removal of Indian children from their families" in order to protect the best interests of Indian children and to promote the stability and security of Indian tribes and their families. 25 USC 1902; *In re Elliott*, 218 Mich App 196, 201; 554 NW2d 32 (1996). In a custody proceeding involving an Indian child, a state court shall apply the minimum standards articulated in the ICWA unless the applicable state law provides a higher standard of protection to the Indian child's parent or Indian custodian. 25 USC 1921 provides:

> In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title, the State or Federal court shall apply the State or Federal standard.

The Michigan Legislature has not enacted any standards providing greater protections than the ICWA to the parent or Indian custodian of an Indian child.

Accordingly, the provisions of the ICWA apply to custody proceedings involving Indian children in Michigan.[4]

We now turn to the three issues necessary to reach our conclusion that the trial court erred by failing to return Z.E. to Empson's custody after she revoked her consent to the Scotts' guardianship of Z.E.

A. DID THE ICWA APPLY TO THE GUARDIANSHIP PROCEEDINGS?

There are two prerequisites to invoking the protections of the ICWA. *In re Johanson*, 156 Mich App 608, 612; 402 NW2d 13 (1986). First, the child must be an "Indian child" as defined by 25 USC 1903(4). *Id.* There is no dispute that Z.E. is an Indian child as the term is defined by the ICWA. Second, the custody proceeding must be "a child custody proceeding" as defined by § 1903(1). *Id.* A "child custody proceeding" is defined to include the "foster care placement" of an Indian child. 25 USC 1903(1). A "foster care placement" is defined as

> any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated. [25 USC 1903(1)(i).]

The ICWA definition of a "foster care placement" contains four requirements: (1) the action removes an Indian child from his parent or Indian custodian, (2) the Indian child is temporarily placed in a foster home, institution, or the home of a guardian or conservator, (3) the parent or Indian custodian is unable to have the child returned upon demand, and (4) the parent's rights

[4] Certain provisions of the ICWA are codified in the court rules. See MCR 3.980.

were not terminated. 25 USC 1903(1)(i); *JW v RJ*, 951 P2d 1206, 1212 (Alas, 1998), overruled in part on other grounds by *Evans v McTaggert*, 88 P3d 1078 (Alas, 2004). In this case, the last three requirements were clearly met. The trial court named the Scotts temporary guardians of Z.E.,[5] ordered that Z.E. shall not be removed from the custody of the Scotts absent the consent and order of the court, and did not terminate the parental rights of Empson. In addition, because Empson had legal custody of Z.E. before the trial court appointed the Scotts as Z.E.'s guardians, the guardianship order removed Z.E. from Empson's custody. See *JW, supra* at 1213. Accordingly, the guardianship proceedings involved a "foster care placement" of Z.E.,[6] and, therefore, the ICWA applied to the proceedings. *In re Johanson, supra*.

Nevertheless, the trial court ruled that the ICWA did not apply to the guardianship proceedings because, at their start, the proceedings were voluntary. This ruling by the trial court misconstrues the ICWA. Voluntariness of the proceedings is only a consideration for purposes of determining whether the Indian child's tribe is entitled to notice of a child custody proceeding. See 25 USC 1912(a).[7] No other provision in the ICWA limits its application to a proceeding based on the

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[5] A temporary guardianship is limited to six months. MCL 700.5213(3).

[6] In reaching this conclusion, we note that the Scotts do not assert, and have never asserted, that the guardianship order did not remove Z.E. from Empson's custody.

[7] 25 USC 1912(a) provides in relevant part:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of . . . an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.

voluntariness of the proceeding. The ICWA, by its terms, applies to voluntary and involuntary child custody proceedings. *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 50 n 25; 109 S Ct 1597; 104 L Ed 2d 29 (1989).[8] Thus, the fact that Empson consented to the Scotts' being appointed guardians of Z.E. was irrelevant in the determination whether the ICWA applied to the guardianship proceedings.

B. WAS EMPSON ALLOWED TO WITHDRAW HER CONSENT TO THE SCOTTS' GUARDIANSHIP?

Having concluded that the ICWA applied to the guardianship proceedings, we must determine whether, pursuant to 25 USC 1913(b), Empson was allowed to withdraw her consent to the Scotts' guardianship of Z.E.

Section 1913(b) provides: "Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian." The language of § 1913(b) appears to be unambiguous. Unambiguous statutory language is to be enforced as written. *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005). Thus, § 1913(b) appears to grant Empson the ability to withdraw her consent "at any time" to the trial court's appointment of the Scotts as Z.E.'s guardians and to have Z.E. returned to her custody.

However, apparently plain statutory language can be rendered ambiguous by its interaction with other statutes. *Ross v Modern Mirror & Glass Co*, 268 Mich App

[8] See, e.g., 25 USC 1913(c) ("In any voluntary proceeding for termination of parental rights to . . . an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination . . . .").

558, 562; 710 NW2d 59 (2005). By definition, a "foster care placement" involves a situation where the parent of an Indian child cannot have the child back on demand. 25 USC 1903(1)(i). Thus, when read together, § 1903(1)(i) and § 1913(b) appear to be in conflict: the former provides that an Indian child in a "foster care placement" cannot be returned to his parent or Indian custodian upon demand by the parent or custodian, while the latter provides that the parent or Indian custodian of the Indian child may withdraw her consent to a "foster care placement" at any time and have the child returned to her custody. A statutory provision is ambiguous if it irreconcilably conflicts with another provision. *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). However, we will only find a statutory provision ambiguous if all other means of interpretation have been applied and found wanting. *Klida v Braman*, 278 Mich App 60, 66; 748 NW2d 244 (2008).

In resolving whether §§ 1903(1)(i) and 1913(b) irreconcilably conflict, we are guided by the following rules of statutory construction. We liberally construe remedial statutes in favor of the persons intended to be benefited. *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 77; 503 NW2d 645 (1993). The ICWA is a remedial statute designed to protect Indian children and the stability and security of Indian tribes and families. 25 USC 1902; see also *Mississippi Band of Choctaw Indians, supra* at 37 ("It does so by establishing a Federal policy that, where possible, an Indian child should remain in the Indian community.") (quotation marks and citation omitted). Accordingly, we are to construe the ICWA in favor of Empson, as she is the intended beneficiary of the ICWA. In addition, we must avoid a construction that would render any part of the statute surplusage or nugatory. *In re Complaint of McLeodUSA*

Telecom Services, Inc, 277 Mich App 602, 611; 751 NW2d 508 (2008). A statutory provision is rendered nugatory when an interpretation fails to give the provision meaning or effect. *Apsey, supra* at 131. Further, we must consider the placement of the apparent conflicting provisions within the act and the purpose of each provision. *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484, 489; 708 NW2d 453 (2005). Finally, we must give the statutory language a reasonable construction that best accomplishes the purpose of the statute. *King v Reed*, 278 Mich App 504, 515; 751 NW2d 525 (2008).

In applying these principles, we note that § 1903 is the definitional section of the ICWA. Because the ICWA only applies if the proceeding is a "child custody proceeding" as defined by § 1903(1), *In re Johanson, supra*, the purpose of § 1903(1) is to define the proceedings to which the ICWA applies. In contrast, § 1913 identifies the rights provided to the parent or Indian custodian of an Indian child when the parent or custodian voluntarily consents to a foster care placement of the child or the parent agrees to the termination of parental rights. Relevant to our consideration, we note that, in addition to § 1913(b), which allows the parent or Indian custodian to withdraw consent to a foster care placement, §1913(c) allows the parent, for any reason, to withdraw consent to the termination of parental rights to, or adoptive placement of, the Indian child at any time before the entry of a final decree of termination or adoption and, pursuant to § 1913(d), after the entry of a final decree of adoption, the parent may withdraw consent on the basis that the consent was obtained through fraud or duress. Thus, the question is whether a definitional provision can render nugatory a provision setting forth a party's substantive rights, because if we were to conclude that § 1903(1)(i) prevents a parent or

Indian custodian from withdrawing consent to a foster care placement of an Indian child, § 1913 would be rendered nugatory. It would have no effect.

As stated above, we must avoid a construction of the ICWA that renders any portion of it surplusage or nugatory. Accordingly, we conclude that § 1903(1)(i) is only applicable when determining whether the ICWA applies to a custody proceeding. It is not applicable when determining the rights of a parent or Indian custodian after the parent or custodian has voluntarily consented to a "foster care placement" of an Indian child. Rather, it is § 1913 that delineates the rights of the parent or Indian custodian who has consented to a "foster care placement" of an Indian child. In other words, if a parent or Indian custodian of an Indian child has consented to a "foster care placement," as the term is defined in § 1903(1)(i), the parent or custodian may "at any time" thereafter withdraw consent to the placement under § 1913(b) and have the Indian child returned to his or her custody. This construction gives effect to both provisions and accomplishes Congress's goal in adopting the ICWA of protecting Indian families. Thus, Empson, even though she voluntarily consented to the trial court's appointment of the Scotts as Z.E.'s guardians, which constituted a "foster care placement" under § 1903(1)(i), had the right to withdraw her consent to the guardianship and to have Z.E. returned to her custody.

C. DID THE ICWA PREEMPT THE STAY MANDATED BY MCL 722.26b(4)?

Empson withdrew her consent to the Scotts' guardianship of Z.E. on December 1, 2004, and August 15,

2005.[9] However, because of the stay imposed by MCL 722.26b(4) in the guardianship proceedings, the trial court never heard Empson's petitions, much less did it return Z.E. to Empson's custody. MCL 722.26b(4) provides in pertinent part:

> Upon the filing of a child custody action brought by a child's guardian or limited guardian, guardianship proceedings concerning that child in the probate court are stayed until disposition of the child custody action. A probate court order concerning the guardianship of the child continues in force until superseded by a circuit court order.

The final issue in reaching our conclusion that the trial court erred by failing to return Z.E. to Empson's custody after Empson withdrew her consent to the Scotts' guardianship of Z.E. is whether the ICWA preempted the stay mandated by MCL 722.26b(4). Federal law preempts a state law if the state law stands as an obstacle to the accomplishment of the full objectives of Congress. *Ammex, Inc v Dep't of Treasury*, 272 Mich App 486, 497; 726 NW2d 755 (2006).

The ICWA provides minimum standards for the removal of Indian children from their families, 25 USC 1902, and a state court must apply those standards unless state law provides a higher standard of protection to the Indian child's parent or Indian custodian, 25 USC 1921. Included within the ICWA's minimum protections for an Indian child's parent is the parent's right to "withdraw consent to a foster care placement under State law *at any time*." 25 USC 1913(b) (emphasis added). Thus, the stay mandated by MCL 722.26b(4) infringed on the minimum protections Empson was

[9] We limit our analysis to whether Empson was entitled to have Z.E. returned to her custody after the filing of the August 15, 2005, petition. Before this petition, no filings indicated that Z.E. was Native American.

afforded under § 1913(b) because once the Scotts moved for sole custody of Z.E. and the guardianship proceedings were stayed, Empson no longer had the ability to withdraw her consent to the Scotts' guardianship of Z.E. and to have Z.E. returned to her custody. In other words, the stay prevented Empson from withdrawing her consent to the guardianship "at any time." Because the stay mandated by MCL 722.26b(4) stood as an obstacle to providing Empson the minimum protections she was afforded by Congress, the ICWA preempted the stay imposed in the guardianship proceedings. Accordingly, upon receiving Empson's August 15, 2005, petition to terminate the Scotts' guardianship of Z.E., the trial court should have lifted the stay and addressed the merits of the petition seeking the return of Z.E. to Empson's custody pursuant to 25 USC 1913(b).

V. CONCLUSION

The ICWA applied to the guardianship proceedings. Consequently, Empson retained the right to revoke her consent to the Scotts' guardianship of Z.E. at any time, and, on August 15, 2005, Empson revoked her consent. Because the ICWA preempted the stay imposed by MCL 722.26b(4) in the guardianship proceedings, the trial court should have terminated the guardianship order and returned Z.E. to Empson's custody as required by 25 USC 1913(b). We therefore vacate the trial court's February 19, 2008, order granting custody of Z.E. to the Scotts[10] and remand this case for the entry of an order

[10] The Scotts only had standing to seek custody of Z.E. because they were his guardians. See MCL 722.26b(1); *Kater v Brausen*, 241 Mich App 606, 610; 617 NW2d 40 (2000). Because the Scotts' guardianship of Z.E. should have been terminated after Empson withdrew her consent to the guardianship in August 2005, the Scotts thereafter had no standing to

terminating the Scotts' guardianship of Z.E. On remand, within a reasonable time, the trial court shall also effectuate the return of Z.E. to Empson.

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

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seek custody of Z.E. See MCL 722.26c (setting forth when a third party may bring an action for custody of a child).

DEPARTMENT OF AGRICULTURE
v APPLETREE MARKETING, LLC

Docket No. 277743. Submitted September 3, 2008, at Grand Rapids. Decided September 16, 2008, at 9:00 a.m. Leave to appeal sought.

The Department of Agriculture and the Michigan Apple Committee brought an action in the Kent Circuit Court against Appletree Marketing, L.L.C., and its manager and sole member, Steven Kropf, after Appletree failed to remit to the Michigan Apple Committee assessments Appletree collected from Michigan apple orchards pursuant to the Agricultural Commodities Marketing Act (ACMA), MCL 290.651 *et seq*. The plaintiffs alleged a violation of the ACMA by Appletree and common-law conversion and statutory conversion by Appletree and Kropf. The plaintiffs moved for summary disposition with regard to all the claims. The defendants consented to a judgment against Appletree for its failure to remit the assessments. However, the defendants contended that treble damages were not available to the plaintiffs under the ACMA and that the ACMA provided the exclusive remedies available to the plaintiffs. The defendants also denied that any conversion occurred. The court, George S. Buth, J., granted the plaintiffs' motion for summary disposition with regard to Appletree's liability under the ACMA, denied the plaintiffs' request for treble damages, and dismissed with prejudice the claims regarding common-law conversion and statutory conversion, ruling that the ACMA provided the exclusive remedies available to the plaintiffs. The plaintiffs appealed.

The Court of Appeals *held*:

1. Absent its obligations under the ACMA, Appletree was under no duty to remit the assessments to the Michigan Apple Committee. The ACMA sets forth new rights and responsibilities not found in the common law and prescribes new remedies for those rights. Therefore, the remedies conferred by the ACMA are the exclusive remedies for a violation of the ACMA.

2. The plaintiffs' common-law and statutory conversion claims do not exist without the ACMA because any duty to remit the assessments is a duty imposed by the ACMA. The plaintiffs are barred from seeking damages under claims of common-law and

statutory conversion because the ACMA provides the exclusive remedies for the violation of duties imposed under the ACMA.

Affirmed.

ACTIONS — AGRICULTURAL COMMODITIES MARKETING ACT — REMEDIES.

The remedies provided in the Agricultural Commodities Marketing Act are the exclusive remedies for a violation of the act; claims alleging common-law conversion or statutory conversion are barred where the claims relate to duties imposed under the Agricultural Commodities Marketing Act (MCL 290.651 *et seq*.).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *White, Schneider, Young & Chiodini, P.C.* (by *James J. Chiodini* and *Shirlee M. Bobryk*), Special Assistant Attorneys General, for the plaintiffs.

Miller Johnson (by *J. Scott Timmer*) for the defendants.

Before: METER, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM. Plaintiffs, Department of Agriculture and Michigan Apple Committee, appeal as of right the trial court's order granting in part and denying in part their motion for summary disposition. Because the remedies conferred by the Agricultural Commodities Marketing Act (ACMA), MCL 290.651 *et seq*., are the exclusive remedies for a violation of the act, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Steven Kropf was the manager and the sole member of defendant Appletree Marketing, L.L.C. (Appletree). Organized in 2001, Appletree purchased or otherwise acquired apples from Michigan apple orchards. It then marketed, sold, and distributed the apples. Kropf knew that, pursuant to the ACMA, Appletree was obligated to remit assessments to the Michigan Apple Committee.

Pursuant to the ACMA, Appletree deducted the assessments from the gross amounts it owed the apple orchards from which it purchased or otherwise acquired apples in 2004 and 2005. However, it failed to remit to the Michigan Apple Committee any of the deducted assessments for the 2004 and 2005 crops. Appletree failed to remit the assessments because it used the assessments to pay other expenses.

In April 2005, the Michigan Apple Committee filed a complaint with the director of the Department of Agriculture asserting that Appletree failed to remit the entire amount of the assessments due for the 2004 apple crop. An investigation confirmed the assertion, and by letter sent by certified mail, the director demanded that Appletree remit the $26,305.98 in assessments owed for the 2004 crop.

In February 2006, the Michigan Apple Committee filed another complaint with the director of the Department of Agriculture, this time asserting that Appletree failed to remit the assessments due for the 2005 apple crop. Again, an investigation confirmed the assertion, and the director, by letter sent by certified mail, demanded that Appletree remit the $28,878.66 owed in assessments.

After Appletree failed to remit the assessments, plaintiffs sued Appletree and Kropf. Plaintiffs asserted a breach of the ACMA against Appletree and set forth claims of common-law conversion and statutory conversion, MCL 600.2919a, against Appletree and Kropf.

Plaintiffs thereafter moved for summary disposition under MCR 2.119(C)(9) and (10) on all three claims. Plaintiffs asserted that summary disposition was proper on the ACMA claim because Appletree conceded that it had violated the ACMA and did not contest the

amount owed. Plaintiffs argued that summary disposition was proper on the common-law and statutory conversion claims because Appletree used the assessments, which, pursuant to the ACMA, were funds it held in trust for the Michigan Apple Committee, for its own purposes. According to plaintiffs, Kropf could be held personally liable for the converted funds because, as the manager of Appletree, he was responsible for authorizing the financial disbursements of the company. Plaintiffs pointed out that it was well established that when a corporation commits a tortious act, its officers and agents are liable for their active participation in the tort.

Defendants consented to a judgment of $55,184.64 against Appletree for its failure to remit the assessments for the 2004 and 2005 apple crops. However, they contended that treble damages were not available to plaintiffs. According to defendants, because the ACMA created new rights and prescribed particular remedies, the remedies identified in the ACMA, which did not include treble damages, were the exclusive remedies available to plaintiffs. In addition, defendants argued that there was no conversion of the assessments by either Appletree or Kropf. First, because Appletree held the assessments with the consent of the Michigan Apple Committee, Appletree did not engage in any act of conversion when it failed to remit the assessments. Second, plaintiffs did not present any evidence that Kropf individually took the money that Appletree was required to remit to the Michigan Apple Committee.

The trial court granted in part and denied in part plaintiffs' motion. Because there was no genuine issue of material fact that Appletree failed to remit the assessments and defendants failed to state a defense, the trial court granted plaintiffs' motion with regard to

Appletree's liability under the ACMA. However, without deciding whether defendants converted the assessments, the trial court held that plaintiffs were not entitled to treble damages. According to the trial court, plaintiffs were limited to the remedies provided in the ACMA, which did not include treble damages. The trial court entered a final judgment against Appletree in the amount of $77,051.23.[1] Plaintiffs' claims of common-law and statutory conversion were dismissed with prejudice.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 663; 697 NW2d 180 (2005). A summary disposition motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Id.* "If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition under this rule is proper." *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000) (quotation marks and citations omitted). Summary disposition is proper under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Tyson Foods, Inc v Dep't of Treasury*, 276 Mich App 678, 683; 741 NW2d 579 (2007). A genuine issue of material facts exists when, after the documentary evidence is viewed in the light most favorable to the nonmoving party, there remains an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

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[1] This amount included the unpaid assessments, statutory interest, attorney fees, audit expenses, and other costs.

We also review questions of statutory interpretation de novo. *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004). Our primary task in construing a statute is to ascertain and give effect to the intent of the Legislature. *Id.* at 665.

III. ANALYSIS

On appeal, plaintiffs claim the trial court erred in determining that the remedies provided in the ACMA were the exclusive remedies for a violation of the act. Plaintiffs contend that because there existed at common law a remedy for the conversion of another's property, the ACMA does not create new rights and remedies. Therefore, the remedies provided in the ACMA are cumulative, rather than exclusive, remedies.

A

The Legislature enacted the ACMA, which became effective in 1966, for "the purpose of providing a procedure whereby marketing programs could be established for a wide variety of Michigan's agricultural products." *Dukesherer Farms, Inc v Director of Dep't of Agriculture (After Remand)*, 405 Mich 1, 9; 273 NW2d 877 (1979). The programs for each commodity are funded by an assessment collected from each producer of the commodity, MCL 290.655(a); *League Gen Ins Co v Michigan Catastrophic Claims Ass'n*, 435 Mich 338, 348; 458 NW2d 632 (1990), and are administered by a commodity committee, see MCL 290.657.

It is the duty of those dealing with the commodity producer to collect and remit the assessments to the commodity committee.

> In the case of a marketing program that provides for the imposition of an assessment, the processors, distributors,

> or handlers dealing with the producer shall collect the assessment from the producer by deducting the assessment from the gross amount owing to the producer and shall remit the assessment . . . to the committee . . . . A processor, distributor, or handler who fails to deduct or remit the assessment is liable to the committee for any assessments not deducted or remitted. [MCL 290.655(c).]

"All assessments collected or deducted shall be considered trust funds and be remitted quarterly or more frequently if required . . . to the appropriate committee." MCL 290.655(e).

The ACMA established the following procedure for the commodity committee and the director of the Department of Agriculture to collect an assessment that a processor, distributor, or handler has failed to remit:

> A committee may file a written complaint with the director documenting that a processor, distributor, handler, or producer has failed to deduct or remit any assessment due to the committee pursuant to a marketing program. Upon receipt of such a complaint, the director shall conduct an investigation of the allegations. If, after investigation, the director finds that the processor, distributor, handler, or producer has failed to deduct or remit an assessment to the committee, the director shall request by certified mail the processor, distributor, handler, or producer to remit the assessment within 10 days after the director determines that a deduction or remittance was not made. In the case of the failure to deduct an assessment, the director shall compute the amount that reasonably should have been deducted and impose an assessment in that amount. If the assessment is not remitted within 30 days after the request or is not in compliance with a written agreement for full payment, the director may file an action in a court of competent jurisdiction to collect the assessment. . . . In any action to recover an assessment under this subsection, if the director prevails, the court shall award to the director all costs and expenses in

> bringing the action, including, but not limited to, reasonable and actual attorney fees, court costs, and audit expenses. [MCL 290.655(f).][2]

The ACMA also contains civil and criminal enforcement provisions. MCL 290.669 provides:

> The director may institute an action necessary to enforce compliance with this act, a rule promulgated under this act, or a marketing agreement or program adopted under this act and committed to his or her administration. In addition to any other remedy provided by law, the director may apply for relief by injunction to protect the public interest without being compelled to allege or prove that an adequate remedy at law does not exist.

MCL 290.673 provides:

> (1) Except as provided in subsections (2) and (3), a person who violates this act is guilty of a misdemeanor punishable by a fine of up to $1,000.00 a day.
>
> (2) A member of the board who intentionally violates section 7(8) shall be subject to the penalties prescribed in the open meetings act, 1976 PA 267, MCL 15.261 to 15.275.
>
> (3) If the board arbitrarily and capriciously violates section 7(9), the board shall be subject to the penalties prescribed in the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

B

If "a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only." *Monroe Beverage Co, Inc v Stroh Brewery Co,* 454 Mich 41, 45; 559 NW2d 297 (1997) (quotation marks and citation

[2] In addition, an unpaid assessment is subject to an interest charge of one percent a month. MCL 290.672.

omitted).[3] However, "[w]hen a statute provides a remedy for enforcement of a common-law right, the statutory scheme is merely cumulative and not exclusive." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 201; 729 NW2d 898 (2006) (holding that the plaintiffs' claims for unjust enrichment were not barred by the availability of relief under the public works bonding act, MCL 129.201 *et seq*., because "[a] plaintiff enjoyed the right at common law to recover in quantum meruit from a defendant who had been unjustly enriched").

At common law there has always been a remedy for those whose property was converted. See, e.g., *Moore v Andrews*, 203 Mich 219, 232; 168 NW 1037 (1918) ("If it shall, however, turn out that the money taken by the defendant was the money of the corporation at all times, as claimed by the plaintiff, the same having been demanded, we are of the opinion that trover would lie for its conversion."). However, before the ACMA took effect in 1966, processors, distributors, or handlers of apples and other commodities grown in Michigan had no duty to deduct an assessment from the gross amount owed to a commodity producer and remit the assess-

[3] In *Pompey v Gen Motors Corp*, 385 Mich 537, 552 n 14; 189 NW2d 243 (1971), our Supreme Court stated that this rule of exclusivity was subject to two qualifications: if the statutory remedy is plainly inadequate or if a contrary intent clearly appears, the statutory remedy will not be deemed exclusive. Recently, however, the Supreme Court noted that the principle —"that some quantum of additional remedy is permitted where a statutory remedy is 'plainly inadequate' "—was announced in dicta in *Pompey*, has never appeared in a majority opinion of the Court, and is inconsistent with subsequent caselaw. *Lash v Traverse City*, 479 Mich 180, 192 n 19; 735 NW2d 628 (2007). Plaintiffs do not allege that the remedies provided in the ACMA were plainly inadequate or that the language of the ACMA expresses a clear intent that the Legislature did not intend the remedies contained in the ACMA to be the exclusive remedies for a violation of the act.

ment to the commodity committee. Absent its obligations under the ACMA, Appletree was under no duty to remit the assessments to the Michigan Apple Committee. Thus, the ACMA sets forth new rights and responsibilities not found in the common law. In addition, the ACMA sets forth mechanisms by which the director of the Department of Agriculture may sue for an unpaid assessment or to ensure compliance with the ACMA. MCL 290.655(f); MCL 290.669. Accordingly, because the ACMA sets forth new rights and responsibilities not found in the common law and prescribes new remedies for those rights, the remedies conferred by the ACMA are the exclusive remedies for a violation of the act. *Monroe Beverage Co, supra*.

C

Nonetheless, plaintiffs argue that even if the remedies contained in the ACMA are the exclusive remedies for a violation of the act, their claim for common-law conversion is not barred because the claim provides a complementary, rather than a conflicting, remedy to those in the ACMA.[4] Similarly, plaintiffs argue that

[4] To support their argument, plaintiffs rely on the following sentence from *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 544 n 5; 683 NW2d 200 (2004): "In other words, if a statute provides for an exclusive remedy or otherwise limits or bars application of other laws, including the common law, any conflicting common law simply cannot apply." Plaintiffs' reliance on this sentence is misplaced. The Court was stating "[i]n other words" the "well-established legal principle that the Legislature may abrogate the common law." *Id*. At issue in *Kraft* was whether the Michigan Gaming Control and Revenue Act (MGCRA), MCL 432.201 *et seq*., "preempted" the plaintiff's common-law claims of fraud and unjust enrichment. The Court concluded that because the common-law claims would prohibit that which was permitted by the MGCRA, the common-law claims were inconsistent with the MGCRA and were, therefore, preempted. *Kraft*, *supra* at 551. In this case, there is no issue whether the ACMA "preempted" plaintiffs' common-law claim for con-

their statutory conversion claim is not barred because the Legislature, through the Revised Judicature Act, MCL 600.101 *et seq.*, and specifically MCL 600.2919a(2), which states that "the remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise," provided a separate statutory means for redress. See, e.g., *Faulkner v Flowers*, 206 Mich App 562; 522 NW2d 700 (1994) (a plaintiff may simultaneously pursue claims under the Whistleblowers' Protection Act, MCL 15.361 *et seq.*, and the wage and fringe benefits act, MCL 408.471 *et seq.*).

We reject both of plaintiffs' arguments for the same reason. Conversion is "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Plaintiffs' claim that Appletree wrongfully exerted domain over the assessments is based entirely on Appletree's duty, imposed by the ACMA, to remit the deducted assessments to the Michigan Apple Committee. In other words, plaintiffs' common-law and statutory conversion claims do not exist without the ACMA. Because the remedies conferred by the ACMA are the exclusive remedies for a violation of the ACMA, plaintiffs are barred from seeking damages for Appletree's violation under claims of common-law and statutory conversion. *Monroe Beverage Co, supra*.[5] We affirm the trial court's order granting in part and denying in part plaintiffs' motion for summary disposition.[6]

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version. If the Legislature had not enacted the ACMA, plaintiffs would have no basis for a claim of conversion against defendants.

[5] Consequently, we need not address plaintiffs' claim that the undisputed facts establish that defendants converted the assessments.

[6] We reject plaintiffs' contention that the trial court, upon finding that "the [ACMA] applies to defendants as distributors of apples," erred by

Affirmed.

not holding Kropf personally liable under the ACMA. In their complaint, plaintiffs did not assert a violation of the ACMA by Kropf. The only claims asserted against Kropf were for common-law and statutory conversion.

GUERRERO v SMITH

Docket Nos. 277983 and 279595. Submitted September 9, 2008, at Lansing. Decided September 16, 2008, at 9:05 a.m.

Thomas L. Guerrero brought an action in the Ingham Circuit Court against Derek A. and Glen I. Smith, alleging and seeking damages for serious impairment of bodily function, i.e., neck injuries and a neurological injury impairing his cognitive abilities and mental acuity, sustained in an automobile accident. The court, Beverley Nettles-Nickerson, J., entered a judgment of no cause of action consistent with a jury's verdict, denied the plaintiff's motion for judgment notwithstanding the verdict or for a new trial, awarded costs to the defendants, and denied the plaintiff's request for sanctions on the defendants pursuant to MCR 2.114 with respect to some of the costs for which they sought reimbursement. The plaintiff filed two appeals, which were consolidated.

The Court of Appeals *held*:

1. Defense counsel at trial did not act improperly by asking the plaintiff about his past use of marijuana. Questions concerning the nature and extent of the plaintiff's marijuana use tended to aid the jury in determining whether his cognitive and mental deficiencies were attributable to the automobile accident or to some other cause. The plaintiff's testimony on this subject was not elicited for the purpose of proving his character, MRE 404(b)(1), nor was it irrelevant, MRE 401, or unfairly prejudicial, MRE 403.

2. The trial court erred by allowing defense counsel to cross-examine witness Steve Porterfield about the plaintiff's past marijuana use. Before specific instances concerning another witness's character for truthfulness or untruthfulness may be inquired into on cross-examination, the witness subject to cross-examination must already have testified on direct examination regarding the other witness's character for truthfulness or untruthfulness. MRE 608(b)(2). Because Porterfield was not called as a character witness and did not testify concerning the plaintiff's character for truthfulness or untruthfulness on direct examination, defense counsel should not have been permitted during Porterfield's cross-examination to elicit testimony concerning specific instances of the plaintiff's marijuana use for the purpose of impeaching the

plaintiff's credibility. The trial court's error was harmless in light of the jury's conclusion, indicated on the special verdict form, that the plaintiff had not suffered a serious impairment of bodily function.

3. Defense counsel likely exceeded the bounds of proper argument when, in referring to a letter from the plaintiff's counsel to a physician concerning a magnetic resonance imaging (MRI) test for the plaintiff, defense counsel stated that the plaintiff's attorney had assisted the plaintiff in "faking it [and] these sorts of things." However, any prejudice that may have resulted was cured by the trial court's instruction to the jury that it should confine deliberations to the actual evidence presented at trial and that the arguments and remarks of the attorneys were not evidence.

4. Defense counsel improperly argued before the jury that the plaintiff did not have health insurance covering his injuries and that the plaintiff had already received wage-loss benefits from his insurer. However, the lack of an objection at trial or a request for a curative instruction to the jury precludes appellate review of this issue.

5. The trial court properly admitted into evidence the letter from the plaintiff's counsel to a physician concerning the MRI test. The letter was not inadmissible hearsay because it was not offered to prove the truth of the matter asserted and, even if it was offered to prove the truth of the matter asserted, it still would not be hearsay because it would be a vicarious admission to a third party, written during the course of an attorney-client relationship. MRE 801(d)(2)(D).

6. The trial court properly refused to give three supplemental jury instructions requested by the plaintiff. The trial court's instructions to the jury properly and adequately instructed the jury on the parties' theories and the relevant law and were substantially similar to the applicable model jury instructions, M Civ JI 36.01, 36.01A, 36.02, and 36.11.

7. The trial court properly denied the plaintiff's motion for judgment notwithstanding the verdict. In order to establish a serious impairment of bodily function, the plaintiff had to, but did not, prove that objectively manifested injuries affected his general ability to lead his normal life.

8. The trial court properly denied the plaintiff's motion for a new trial. The overwhelming weight of the evidence, when viewed in total, did not favor the plaintiff.

9. Taxed costs of $1,205.25 for a private investigator, $1,351.50 for exhibit enlargement, $562.32 for the defendants' and their attorney's travel costs, $300 for copying costs, $75 for case

evaluation, and $35 for the copying of a surveillance video are not supported by statutory authority and must be deducted from the awarded costs. In contrast, taxed costs of $41.06 for the copying of a physician's video deposition and $70 for the copying of other doctors' video depositions, which video depositions were filed in the clerk's office and used as evidence at trial, are authorized by MCR 2.315(I) and MCL 600.2549.

10. The trial court did not abuse its discretion by awarding $4,142.50 as the expert-witness fee of a physician presented by the defendants. MCL 600.2164 authorizes a trial court to award expert-witness fees as an element of taxable costs, including fees for the expert's preparation time, and the award in this case did not fall outside the range of principled and reasonable outcomes.

11. The trial court did not clearly err by declining to sanction defendants under MCR 2.114 with respect to their motion for taxable costs. The defendants likely honestly believed that many of the disputed costs were taxable, and their arguments in support of those costs were not frivolous.

Affirmed in part, reversed in part, and remanded.

1. APPEAL — IMPROPER CONDUCT OF ATTORNEY.

An appellate court reviewing an appeal asserting improper conduct of an attorney during a trial should determine if the claimed error was in fact error and, if so, whether it was harmless; if the claimed error was not harmless, there is a right to appellate review if the error was properly preserved either by objection and request for instruction or by motion for a mistrial; if the error was not harmless but was preserved, the court must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial; a new trial may be granted if the court cannot say that the result was not affected.

2. EVIDENCE — APPEAL.

Evidentiary error in civil cases is considered harmless unless declining to grant a new trial, set aside a verdict, or vacate, modify, or otherwise disturb a judgment or order appears to the reviewing court inconsistent with substantial justice.

3. NEGLIGENCE — TRIAL — ATTORNEYS — REFERENCES TO INSURANCE COVERAGE AND BENEFITS.

Attorneys in an action for personal injury may not inject or argue the existence or nonexistence of insurance coverage or other remedies available to the plaintiff.

4. COURTS — JURY INSTRUCTIONS — SUPPLEMENTAL JURY INSTRUCTIONS — APPEAL.

A trial court's decision on a request for supplemental jury instructions is reviewed on appeal for abuse of discretion; a decision will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice.

5. MOTIONS AND ORDERS — JUDGMENT NOTWITHSTANDING THE VERDICT — APPEAL.

A trial court's ruling on a motion for judgment notwithstanding the verdict is reviewed de novo on appeal; the evidence is viewed in the light most favorable to the nonmoving party; if reasonable jurors could honestly have reached different conclusions, the jury verdict must stand.

6. MOTIONS AND ORDERS — NEW TRIAL — APPEAL.

A trial court presented with a motion for a new trial must determine whether the overwhelming weight of the evidence favors the losing party; on appeal, the trial court's determination is reviewed for abuse of discretion, but substantial deference is given to the trial court's conclusion that the verdict was not against the great weight of the evidence.

7. COSTS — TAXATION OF COSTS — APPEAL.

A trial court's ruling on a prevailing party's motion to tax costs is reviewed on appeal for abuse of discretion; however, whether a particular expense is taxable as a cost is a question of law (MCR 2.625).

8. COSTS — EXPERT-WITNESS FEES.

A trial court may award expert-witness fees, including fees for the expert's preparation time, as an element of taxable costs (MCL 600.2164).

9. PLEADING — SIGNATURE ON PLEADINGS — SANCTIONS.

The filing of a signed document that is not well grounded in law subjects the filer to sanctions pursuant to MCR 2.114(E).

John L. Noud for the plaintiff.

Secrest Wardle (by *Janet Callahan Barnes*) for the defendants.

Before: CAVANAGH, P.J., and JANSEN and KELLY, JJ.

PER CURIAM. In Docket No. 277983, plaintiff appeals by right the trial court's judgment for defendants on a jury verdict of no cause of action. In Docket No. 279595, plaintiff appeals by right the trial court's postjudgment order taxing costs and denying plaintiff's request to sanction defendants under MCR 2.114. This Court has consolidated the appeals. We affirm in part, reverse in part, and remand for modification of the order taxing costs consistent with this opinion.

I. ALLEGED MISCONDUCT OF DEFENSE COUNSEL

In Docket No. 277983, plaintiff first argues that he was prejudiced by several instances of misconduct by defense counsel and that he is therefore entitled to a new trial. We disagree.

A

The proper standard of review for claims of attorney misconduct in civil cases was discussed by our Supreme Court in *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982):

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand

> simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action.

See also *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 682-683; 630 NW2d 356 (2001), and *Badalamenti v William Beaumont Hosp*, 237 Mich App 278, 290; 602 NW2d 854 (1999).

B

Plaintiff argues that defense counsel prejudicially and improperly questioned him and another witness regarding his past marijuana use. Relying in part on *Wayne Co Bd of Rd Comm'rs v GLS LeasCo, Inc*, 394 Mich 126, 136-138; 229 NW2d 797 (1975), plaintiff asserts that "such questioning was irrelevant and prejudicial" and that it evidenced "a deliberate and calculated attempt to prejudice the jury."

Plaintiff has maintained throughout this case that he sustained a traumatic brain injury as a result of an automobile accident on July 22, 2002, and that this neurological injury has impaired his cognitive abilities and mental acuity. Plaintiff testified at trial that the symptoms of his alleged closed head injury included cognitive deficiencies, confusion, forgetfulness, difficulty in organizing his thoughts and affairs, and a general inability to focus. As evidenced by the deposition testimony of plaintiff's witness, Dr. Hankenson, at least one of plaintiff's physicians apparently believed that the nature and extent of plaintiff's marijuana use was a relevant consideration in diagnosing plaintiff's condition.

It is true that defense counsel was not permitted to prove plaintiff's "general lack of morality" with evidence of past instances of specific conduct such as marijuana use. *People v Crabtree*, 87 Mich App 722, 726;

276 NW2d 478 (1979). Nor is an attorney generally permitted to prove a person's bad character with specific instances of past conduct. See MRE 404(b)(1). However, it does not appear that defense counsel's questions concerning plaintiff's past marijuana use were designed to attack plaintiff's general character or morality. Instead, defense counsel's questions were designed to determine whether plaintiff's past marijuana use had in any way affected his cognitive abilities and mental acuity independent of the July 2002 automobile accident. Many of the mental and cognitive symptoms attributed by plaintiff to the automobile accident could equally have been attributable, at least in part, to other causal factors such as drug use. Defense counsel's questioning of plaintiff concerning the nature and extent of his marijuana use tended to aid the jury in determining whether plaintiff's cognitive and mental deficiencies were attributable to the automobile accident or to some other cause. The testimony elicited from plaintiff on this subject did not run afoul of MRE 404(b)(1) because it was not elicited for the purpose of proving plaintiff's bad character. Nor was the testimony irrelevant or unfairly prejudicial. MRE 401; MRE 403.[1] Defense counsel did not act improperly by asking plaintiff about his past marijuana use.

Plaintiff also argues that it was improper for defense counsel to question witness Steve Porterfield on cross-examination concerning plaintiff's past marijuana use.

[1] Because plaintiff's testimony concerning his past marijuana use was relevant only as it related to his cognitive abilities, mental state, and medical condition, a request for a limiting instruction would have been appropriate. MRE 105; see also *Wood v State*, 20 Ark App 61, 66; 724 SW2d 183 (1987). However, no such limiting instruction was requested. The trial court is under no obligation to provide a limiting instruction when none is requested. MRE 105; *People v Rice* (*On Remand*), 235 Mich App 429, 444; 597 NW2d 843 (1999).

It is clear from the record that defense counsel sought to question Porterfield concerning plaintiff's past marijuana use for the purpose of impeaching plaintiff's credibility on this issue. Plaintiff initially testified that he had smoked marijuana only once at a University of Michigan football tailgate party. Plaintiff then admitted that although he had also smoked marijuana occasionally as a teenager, he no longer used the drug. It is clear that defense counsel's questioning of Porterfield—who worked for plaintiff during the summers of 1999, 2000, 2001, 2002, and 2003—was designed to test plaintiff's credibility with respect to the issue of marijuana use. Indeed, Porterfield testified in response to defense counsel's questions that he had smoked marijuana with plaintiff a "couple times" between 1999 and 2003, thereby undercutting the credibility of plaintiff's earlier testimony.

The problem with defense counsel's questioning of Porterfield, however, is that it did not satisfy the technical requirements of MRE 608(b)(2). Pursuant to MRE 608(b)(2), "[s]pecific instances of the conduct of a witness" may, "if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." In light of plaintiff's own testimony that he had used marijuana only once since his teenage years, evidence that Porterfield had smoked marijuana with plaintiff a "couple times" since 1999 would have been probative of plaintiff's truthfulness or untruthfulness. Therefore, defense counsel's questioning of Porterfield satisfied one of the prongs of MRE 608(b)(2). However, Porterfield had not been called as a character witness and did not testify concerning plaintiff's character for truthfulness or untruthfulness on direct examination. Before

specific instances concerning another witness's character for truthfulness or untruthfulness may be inquired into on cross-examination, the witness subject to cross-examination must already have testified on direct examination regarding the other witness's character for truthfulness or untruthfulness. MRE 608(b)(2); see also *People v Fuzi No 1*, 116 Mich App 246, 252; 323 NW2d 354 (1982). Because Porterfield was not called as a character witness and did not testify concerning plaintiff's character for truthfulness or untruthfulness on direct examination, defense counsel was not permitted to elicit from him on cross-examination testimony concerning specific instances of marijuana use for the purpose of impeaching plaintiff. MRE 608(b)(2). The trial court erred by admitting Porterfield's testimony in this regard.

Nonetheless, defense counsel's improper questioning of Porterfield concerning specific instances of marijuana use with plaintiff was harmless. In civil cases, evidentiary error is considered harmless unless "declining to grant a new trial, set aside a verdict, or vacate, modify, or otherwise disturb a judgment or order 'appears to the court inconsistent with substantial justice.' " *Chastain v Gen Motors Corp*, 467 Mich 888 (2002) (citation omitted); see also *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). As indicated on the special verdict form, although the jurors ultimately concluded that plaintiff had not suffered a serious impairment of body function, they did conclude that plaintiff was, in fact, injured as a result of the July 2002 automobile accident. Moreover, the jurors had heard both plaintiff's own testimony and the deposition testimony of Dr. Hankenson on the issue of plaintiff's marijuana use. In light of the jury's special verdict in this case, and taking into account the other admissible evidence concerning plaintiff's past marijuana use, we

simply cannot conclude that the improperly elicited testimony of Porterfield was so prejudicial that declining to set aside the verdict or grant a new trial would be inconsistent with substantial justice. *Chastain*, *supra* at 888. Porterfield's improperly elicited testimony concerning specific instances of marijuana use with plaintiff was therefore harmless, *id*., and we will not reverse on the basis of harmless error, *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 529; 730 NW2d 481 (2007).

C

Plaintiff next argues that defense counsel prejudicially emphasized and mischaracterized a letter written by his attorney to Dr. Joel Saper on September 8, 2005. The letter stated, in pertinent part:

> Dear Dr. Saper:
>
> * * *
>
> Enclosed is a copy of an abstract of an article . . . entitled "MRI [magnetic resonance imaging] assessment of the alar ligaments in the late stage of whiplash injury—a study of structural abnormalities and observer agreement." According to the (abstract) study, whiplash trauma can cause permanent damage to the alar ligaments which can be objectively evidenced by a high resolution proton density-weighted MRI.
>
> * * *
>
> In order to prevail in litigation against the driver of the motor vehicle which rear-ended him (and injured him), Tom must have objective evidence of injury to his craniovertebral junction.
>
> In the hope that it will provide such objective evidence of injury, Tom needs an MRI study, which accords with the

> protocol described in the enclosed abstract. Specifically, Tom needs a "proton density-weighted MRI of the cranio-vertebral junction in three orthogonal planes." Can you arrange for such an MRI?
>
> Thanks for your consideration of this request.
>
> Sincerely yours,
>
> John L. Noud

The trial court admitted this letter into evidence. Defense counsel argued, both during his opening statement and during his closing argument, that the letter "speaks volumes" and that it evidenced a plan by plaintiff and his attorney to find favorable evidence of "an objective sign of injury to get to a jury." Defense counsel also argued that the letter showed that plaintiff's attorney had assisted plaintiff in "faking it [and] these sorts of things." Because plaintiff did not object to these statements by defense counsel, our review is for plain error. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

It is true that counsel must avoid arguing that a party or attorney has "bought" testimony or witnesses "when there is no basis in the evidence for any such charge." *GLS LeasCo, Inc*, *supra* at 137 (citation and quotation marks omitted). However, unlike the situation presented in *GLS LeasCo, Inc*, defense counsel never argued that plaintiff and his counsel had "bought" favorable evidence in the case at bar. Moreover, as noted previously, the letter to Dr. Saper had already been admitted into evidence. Accordingly, there *was* a "basis in the evidence" to support the charge that plaintiff and his attorney had set out to find and obtain favorable evidence in this case.

We acknowledge that defense counsel likely exceeded the bounds of proper argument when he stated in reference to the letter that plaintiff's attorney had

assisted plaintiff in "faking it [and] these sorts of things." However, plaintiff never objected to this comment or requested a curative instruction. Furthermore, the trial court twice instructed the jurors that they should confine their deliberations to the actual evidence presented at trial and that the arguments and remarks of the attorneys were not evidence. These instructions were sufficient to cure the prejudice arising from defense counsel's improper remarks. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). We accordingly find no outcome-determinative plain error. See *Veltman*, *supra* at 690.

D

Plaintiff argues that defense counsel improperly raised the issues of plaintiff's wage-loss benefits and plaintiff's lack of health insurance at trial. Because plaintiff did not object to the challenged remarks of defense counsel in this regard, our review is for plain error. *Id*.

It is true that attorneys must avoid injecting the issue of insurance coverage and benefits into trial. *Felice v Weinman*, 372 Mich 278, 280; 126 NW2d 107 (1964); *Kokinakes v British Leyland, Ltd*, 124 Mich App 650, 652; 335 NW2d 114 (1983). "[O]ur prior cases have made it clear that it is not relevant whether or not a plaintiff seeking recovery for personal injury has other remedies available and, therefore, the topic should not be raised before the jury." *Reetz*, *supra* at 104. Accordingly, it was error for defense counsel to argue before the jury that plaintiff did not have health insurance to cover his injuries and that plaintiff had already received wage-loss benefits from his insurance carrier. *Id*. However, as previously explained, the trial court instructed the jury that it should confine its deliberations to the

actual evidence presented at trial and that the statements and remarks of counsel were not evidence. Such instructions were sufficient to cure any prejudice arising from the remarks of counsel. *Tobin*, *supra* at 641.

Moreover, any prejudice resulting from defense counsel's improper references to plaintiff's lack of health insurance and collection of wage-loss benefits "could have been cured by an instruction from the bench . . . ." *Reetz*, *supra* at 105. An improper reference to insurance coverage or benefits during trial is simply not the type of error that cannot be alleviated by a timely objection and curative instruction. *Id.*; see also *Fritz v McDonough Power Equip Co*, 432 Mich 904 (1989). Because there was no objection or request for a curative instruction when defense counsel referred to plaintiff's lack of health insurance and collection of wage-loss benefits, further appellate review of this issue is precluded. *Reetz*, *supra* at 105; *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996).

Finally, even if this issue had been properly preserved, we note that the jurors never reached the issue of damages in this case. Indeed, the jury specifically found that plaintiff had not suffered a serious impairment of body function and that he was consequently entitled to no tort recovery. We believe that this finding by the jury was sufficient to overcome any presumption of prejudice raised by defense counsel's improper references to plaintiff's insurance coverage and benefits. See *Kokinakes*, *supra* at 654.

II. ALLEGED EVIDENTIARY AND INSTRUCTIONAL ERROR

Plaintiff argues that the trial court erred by admitting into evidence the aforementioned letter written by his attorney to Dr. Joel Saper on September 8, 2005, and

by declining to give three requested supplemental jury instructions. Again, we disagree.

A

While preliminary questions of law are reviewed de novo, a trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). An abuse of discretion occurs when the court's decision falls outside the range of principled and reasonable outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Jury instructions are reviewed in their entirety to determine whether they accurately and fairly presented the applicable law and the parties' theories. *Meyer v Center Line*, 242 Mich App 560, 566; 619 NW2d 182 (2000). We review for an abuse of discretion the trial court's decision regarding supplemental jury instructions. *Grow v W A Thomas Co*, 236 Mich App 696, 702; 601 NW2d 426 (1999). We "will not reverse a court's decision regarding supplemental instructions unless failure to vacate the verdict would be inconsistent with substantial justice." *Id*.

B

Plaintiff argues that the letter written by his attorney to Dr. Saper constituted inadmissible hearsay. The letter from plaintiff's attorney to Dr. Saper did not constitute hearsay because it was not offered to prove the truth of the matter asserted. MRE 801(c); *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 30; 436 NW2d 70 (1989). Indeed, it was merely offered to show that plaintiff and his attorney had attempted to locate objectively manifested evidence of plaintiff's injuries. Moreover, even if the letter had been offered to prove the truth of the matter asserted, it still

would not have constituted hearsay because it was a vicarious admission to a third party, written by plaintiff's attorney during the course of and in furtherance of the attorney-client relationship. MRE 801(d)(2)(D); see also *United States v Amato*, 356 F3d 216, 220 n 3 (CA 2, 2004), and *United States v Brandon*, 50 F3d 464, 468 (CA 7, 1995). The trial court did not err by admitting the letter into evidence.

C

Plaintiff also argues that the trial court erred by refusing to give three supplemental jury instructions that he requested. As this Court explained in *Koester v City of Novi*, 213 Mich App 653, 664; 540 NW2d 765 (1995), rev'd in part on other grounds 458 Mich 1 (1998),

> [w]hen the standard instructions do not properly cover an area, a trial court is required to give requested supplemental instructions if they properly inform the jury of the applicable law. *Sherrard v Stevens*, 176 Mich App 650, 655; 440 NW2d 2 (1988). However, it is error to instruct the jury on a matter not supported by the evidence. *Mills v White Castle Systems, Inc*, 199 Mich App 588, 591; 502 NW2d 331 (1992). The determination whether supplemental instructions are applicable and accurate is within the trial court's discretion. *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993).

Plaintiff requested three supplemental jury instructions, all of which the trial court declined to give. The first supplemental jury instruction requested by plaintiff provided:

> The following nonexhaustive list of objective factors may be of assistance in evaluating whether plaintiff's "general ability" to conduct the course of his normal life has been affected: (a) the nature and extent of the impair-

> ment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. This list of factors in not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves.

The language of this requested instruction was lifted word-for-word from our Supreme Court's decision in *Kreiner v Fischer*, 471 Mich 109, 133-134; 683 NW2d 611 (2004). Therefore, we acknowledge that it would have "properly inform[ed] the jury of the applicable law." *Koester*, *supra* at 664.

However, we conclude that the trial court was not required to give plaintiff's first requested supplemental jury instruction because it had already properly and adequately instructed the jury on the relevant law. Specifically, the trial court instructed the jury as follows:

> One of the elements Plaintiff must prove in order to recover noneconomic loss damages in this case is that he sustained a serious impairment of body function.
>
> Serious impairment of body function means an objectively manifested impairment of an important body function that affects Plaintiff's general ability to lead his normal life. An impairment does not have to be permanent in order to be a serious impairment of body function.
>
> In order for an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis.
>
> * * *
>
> If you find Plaintiff suffered serious impairment of body function, but his injury has ceased, or may in the future cease to be a serious impairment of body function, that fact will not relieve Defendants from liability for any of the

> noneconomic loss damages suffered by Plaintiff as a proximate result of [defendants'] negligence.
>
> The operation of the mind and of the nervous system are body functions. Mental or emotional injury which [is] caused by physical injury or mental or emotional injury not caused by physical injury but which results in physical symptoms may be a serious impairment of body function.

The court's actual instructions were substantially similar to the applicable model jury instructions and substantially paralleled the language of M Civ JI 36.01, 36.01A, 36.02, and 36.11. These instructions adequately conveyed to the jury the applicable law and the meaning of the phrases "serious impairment of body function" and "objectively manifested." Notably, the instructions as read informed the jury that it should consider the duration of any injuries sustained by plaintiff, that an injury need not be permanent in order to qualify as a serious impairment of body function, and that an injury could constitute a serious impairment of body function even if plaintiff were to eventually recover. Because the instructions, as given, properly covered the area, the trial court was not required to give plaintiff's first requested supplemental jury instruction. *Koester*, *supra* at 664; *Sherrard*, *supra* at 655.

The second and third supplemental jury instructions requested by plaintiff provided that "[m]uscle spasms and loss of normal cervical lordotic curve may establish an objectively manifested injury" and "[m]emory is an important body function, and neuropsychological testing may suffice as an objective manifestation of an important body function." This Court has observed that muscle spasms and loss of the normal lordotic curve may qualify as objective manifestations of injury. See, e.g., *Chumley v Chrysler Corp*, 156 Mich App 474, 481-482; 401 NW2d 879 (1986); *Shaw v Martin*, 155 Mich App 89, 97; 399 NW2d 450 (1986); *Harris v*

Lemicex, 152 Mich App 149, 153-154; 393 NW2d 559 (1986); *Franz v Woods*, 145 Mich App 169, 176; 377 NW2d 373 (1985), overruled on other grounds by *DiFranco v Pickard*, 427 Mich 32 (1986). This Court has also observed that memory is an important body function and that neuropsychological testing may suffice to show an objective manifestation of a serious impairment of that body function. *Shaw*, *supra* at 93-95; see also *Luce v Gerow*, 89 Mich App 546, 549-550; 280 NW2d 592 (1979). Therefore, plaintiff's second and third proposed supplemental instructions would also have "properly inform[ed] the jury of the applicable law." *Koester*, *supra* at 664.

However, as with plaintiff's first proposed instruction, we cannot conclude that the trial court erred by declining to give plaintiff's second and third proposed supplemental jury instructions. This was a well-tried case. Both plaintiff's attorney and defendants' attorney presented cogent and well-crafted arguments to the jury. Plaintiff's attorney thoroughly summarized the pertinent evidence and comprehensively explained plaintiff's theories of liability. Plaintiff's attorney argued that the x-rays and physical examinations had revealed muscle spasms in plaintiff's neck and a loss of the normal lordotic curve in plaintiff's neck and back. He argued that these x-rays and examinations constituted objective manifestations of neck and back injuries. Plaintiff's attorney also pointed out that plaintiff's doctors had conducted extensive neuropsychological testing on plaintiff. He argued that the results of this neuropsychological testing "constitute objective evidence of a brain injury." He lastly noted that the court would read M Civ JI 36.02, and argued to the jury that "[t]he operation of the mind and of the nervous system" were important body functions.

As noted previously, the trial court instructed the jury that "[i]n order for an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis"[2] and that "[t]he operation of the mind and of the nervous system are body functions. Mental or emotional injury which [is] caused by physical injury or mental or emotional injury not caused by physical injury but which results in physical symptoms may be a serious impairment of body function."[3] There is simply no indication that the jury misunderstood plaintiff's theories of liability in this case, that the jury did not comprehend the applicable legal principles, or that it was unaware of plaintiff's position that the x-rays, other physical examinations, and neuropsychological testing had produced objectively manifested evidence of neck, back, and neurological injuries. Because the court's instructions properly covered the relevant areas, the trial court did not err by declining to give plaintiff's second and third requested supplemental jury instructions. *Koester*, *supra* at 664; *Sherrard*, *supra* at 655.

The jury instructions read by the trial court in this case accurately and fairly presented the applicable law and the parties' theories. *Meyer*, *supra* at 566. We perceive no instructional error requiring reversal.

III. MOTION FOR JNOV OR NEW TRIAL

Plaintiff next argues that the trial court erred by denying his motion for judgment notwithstanding the verdict (JNOV) or alternatively a new trial. We disagree. Reasonable jurors could honestly have reached

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[2] See M Civ JI 36.11.

[3] See M Civ JI 36.02.

different conclusions in this case, and the jury's verdict of no cause of action was not against the great weight of the evidence.

A

"This Court reviews de novo a trial court's ruling on a motion for JNOV." *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). In doing so, we must view the evidence in a light most favorable to the nonmoving party. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). " 'If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand.' " *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998), quoting *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

"[W]ith respect to a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party." *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). "This Court's function is to determine whether the trial court abused its discretion in making such a finding." *Id*. We give substantial deference to the trial court's conclusion that a verdict was not against the great weight of the evidence. *Id*.

B

Plaintiff argues that the evidence presented at trial established that he suffered a serious impairment of body function as a matter of law. He asserts that the trial court should have granted his motion for JNOV for this reason.

Following trial, the jury returned a unanimous verdict of no cause of action. The jury determined (1) that

defendant Derek Smith was negligent, (2) that plaintiff was injured in the accident, (3) that Smith's negligence was a proximate cause of plaintiff's injuries, but (4) that plaintiff's injuries had not resulted in a serious impairment of body function. The question whether plaintiff had suffered a serious impairment of body function turned largely on the testimony and reports of physicians and psychologists, as well as the testimony of plaintiff himself.

In order to establish a serious impairment of body function, plaintiff was required to prove that he had suffered one or more objectively manifested injuries that affected his general ability to lead his normal life. MCL 500.3135(7); *Kreiner*, *supra* at 132.

As an initial matter, there was conflicting evidence with respect to whether plaintiff's alleged injuries were objectively manifested. Physical examinations and x-rays appeared to show that plaintiff had sustained muscle spasms and a loss of the normal lordotic curve in his neck and back as a result of the July 2002 automobile accident. In addition, both Dr. Branca and Dr. Andary opined that plaintiff had suffered a traumatic brain injury as a result of the accident, and plaintiff himself testified at length concerning not only his alleged neurological and cognitive symptoms, but also concerning his back, neck, and head pain. In contrast, Dr. Chodoroff did not believe that plaintiff had sustained brain trauma as a result of the July 2002 automobile accident, and suggested that much of plaintiff's pain was likely attributable to a degenerative disc condition that had been present in plaintiff's neck and back since before 2002.

But even assuming, for the sake of argument, that plaintiff's alleged back, neck, head, and neurological injuries were all objectively manifested, we find that

reasonable jurors could have honestly concluded that plaintiff's injuries did not affect his general ability to lead his normal life. It is true that plaintiff testified that his life had changed since the accident. For example, plaintiff complained that he was no longer able to perform many of the tasks that he had taken for granted before the accident. Buttressing plaintiff's testimony in this regard, Dr. Andary testified that plaintiff's neurological deficits, mood disorders, pain, headaches, and depression would likely "be persistent." Dr. Andary also "doubt[ed] that [plaintiff's] neck pain will ever go away," and "suspect[ed]" that plaintiff's occipital neuralgia would "be permanent." In contrast, however, other testimony painted a somewhat different picture. For instance, plaintiff admitted that he had begun building a deck and that he had used heavy equipment since the July 2002 accident. Plaintiff also admitted that he continued to exercise, ride a bike, jog, and play tennis, and even testified that he had taken up hunting since the 2002 accident. Similarly, witness Susan Barry was confident that plaintiff "could perform the duties of a tennis coach," even after the July 2002 accident. Finally, the surveillance video played for the jury showed that plaintiff had plowed and shoveled snow without any apparent difficulties during early 2007. In short, plaintiff's claim that he could no longer lead his preaccident lifestyle was belied by certain opposing testimony, which showed that plaintiff continued to engage in many of the same work and recreational activities that he had enjoyed before the accident.

Viewing the evidence in a light most favorable to defendants, *Sniecinski*, *supra* at 131, we find that reasonable jurors could honestly have reached different conclusions with respect to whether plaintiff's injuries affected his general ability to lead his normal life.

Central Cartage, *supra* at 524. Because reasonable jurors could have honestly differed on this issue, the trial court did not err by denying plaintiff's motion for JNOV. *Id*.

C

Nor did the trial court err by denying plaintiff's motion for a new trial, which was predicated on the ground that the jury's verdict was against the great weight of the evidence. The evidence in this case did not overwhelmingly favor either side. With respect to whether plaintiff's alleged injuries were objectively manifested, the jury's determination turned largely on the weight ascribed to the testimony of the individual physicians and psychologists. "The weight given to the testimony of experts is for the jury to decide," and it is the province of the jury to decide which expert to believe. *Phillips v Deihm*, 213 Mich App 389, 401-402; 541 NW2d 566 (1995); see also *Detroit v Larned Assoc*, 199 Mich App 36, 41; 501 NW2d 189 (1993). Further, with respect to whether plaintiff's alleged injuries had affected his general ability to lead his normal life, the jury's determination turned largely on plaintiff's own credibility. It is the jury's responsibility to determine the credibility and weight of the trial testimony. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). The jury has the discretion to believe or disbelieve a witness's testimony, even when the witness's statements are not contradicted, *Baldwin v Nall*, 323 Mich 25, 29; 34 NW2d 539 (1948), and we must defer to the jury on issues of witness credibility, *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006).

We give substantial deference to the trial court's conclusion that the jury's verdict was not contrary to the great weight of the evidence. *Phinney*, *supra* at 525. In view of the totality of the evidence presented at trial, we simply cannot conclude that "the overwhelming weight of the evidence" favored plaintiff in this case. *Id*. The trial court did not abuse its discretion by denying plaintiff's motion for a new trial on the ground that the verdict was against the great weight of the evidence. *Id*.

IV. TAXATION OF COSTS

In Docket No. 279595, plaintiff argues that the trial court erred by allowing defendants to improperly tax certain of their expenses as costs. We agree in part.

A

We review for an abuse of discretion the trial court's ruling on a motion to tax costs under MCR 2.625. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996). However, whether a particular expense is taxable as a cost is a question of law. We review questions of law de novo. *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002).

B

"Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." MCR 2.625(A)(1); see also *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 621; 550 NW2d 580 (1996). The power to tax costs is purely statutory, and the prevailing party cannot recover such expenses absent statutory authority. *Elia v*

Hazen, 242 Mich App 374, 379; 619 NW2d 1 (2000). The starting presumption in all civil cases is:

> "[C]osts shall be allowed as a matter of course to the prevailing party. *This does not mean, of course, that every expense incurred by the prevailing party in connection with the proceeding may be recovered against the opposing party*. The term 'costs' as used [in] MCR 2.625(A) takes its content from the statutory provisions defining what items are taxable as costs." [*Beach*, *supra* at 622, quoting 3 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), pp 720-721 (emphasis added).]

Defendants, as the prevailing parties at trial, filed a motion to tax costs under MCR 2.625 in the amount of $10,768.18. Specifically, defendants sought to tax the following expenses as costs: (1) The case evaluation fee of $75, (2) three motion fees, totaling $60, (3) transcript and videotaping costs related to the depositions of Dr. Hankenson, Dr. Branca, Dr. Andary, and Dr. Chodoroff, totaling $2,681.61,[4] (4) copying of the doctors' video depositions for trial, totaling $70, (5) a copy of the surveillance video for plaintiff's counsel, totaling $35, (6) expert witness fees for Dr. Chodoroff in the amount of $4,142.50, (7) "Investigator Costs" for witness Gary Setla in the amount of $1,305.25, (8) statutory attorney fees in the amount of $170, (9) costs for "Blow Up Mounts" in the amount of $1,351.50, (10) a subpoena fee for witness Lauren Bell in the amount of $15, (11) mileage to and from trial in the amount of $562.32, and (12) general "Copying Charges" in the amount of $300.

Plaintiff first argues that there was no legal authority supporting the taxation of "Investigator Costs" for

[4] In particular, defendants sought $239.80 for "Dr. Hankenson—Transcript Fee"; $974.25 for "Dr. Branca and Dr. Andary Transcript Fees"; $41.06 for "Dr. Hankenson—Video Copy"; $1,031.50 for "Deposition Transcript of Dr. Brian Chodoroff"; and $395 for "Videotape of Dr. Chodoroff."

witness Gary Setla in the amount of $1,305.25. Defendants respond by arguing that Setla was an "expert witness" and that the "Investigator Costs" were therefore taxable pursuant to MCL 600.2164.

It is true that "MCL 600.2164(1) authorizes a trial court to award expert witness fees as an element of taxable costs." *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 466; 633 NW2d 418 (2001). However, Setla was never qualified as an expert witness at trial. Moreover, even if Setla had been qualified as an expert, the "Investigator Costs" still would not have been taxable under MCL 600.2164 because a review of that statute reveals that it is expressly inapplicable here. MCL 600.2164(3) states that the statute does not apply to "witnesses testifying to the established facts, or deductions of science, *nor to any other specific facts*, but only to witnesses testifying to matters of opinion." (Emphasis added.) Setla, a private investigator, took surveillance film for the express purpose of establishing the *fact* that plaintiff was still able to engage in certain of his preaccident activities such as plowing and shoveling snow. Setla was not hired to testify concerning a matter of opinion. Thus, the statute does not apply, and the "Investigator Costs" of $1,305.25 were not taxable pursuant to MCL 600.2164. *Century Dodge, Inc v Chrysler Corp*, 154 Mich App 537, 547-548; 398 NW2d 1 (1986). Nor have we located any other statute or court rule that would authorize the taxation of these "Investigator Costs." Because the "Investigator Costs" in the amount of $1,305.25 were not taxable, the trial court abused its discretion by awarding them as an element of the taxed costs. *Klinke*, *supra* at 518.

Plaintiff next argues that there was no legal authority permitting taxation of costs for "Blow Up Mounts" in the amount of $1,351.50. Plaintiff is correct. The

expense of exhibit enlargement is not a taxable cost. *J C Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 429; 552 NW2d 466 (1996); *Taylor v Anesthesia Associates of Muskegon*, 179 Mich App 384, 387; 445 NW2d 525 (1989). The trial court abused its discretion by awarding the expense of "Blow Up Mounts" as an element of the taxed costs. *Klinke*, *supra* at 518.

Plaintiff also argues that there was no authority allowing the taxation of mileage to and from trial in the amount of $562.32. Again, plaintiff is correct. Although the traveling expenses of witnesses may be taxed as costs, MCL 600.2405(1); MCL 600.2552(1); MCL 600.2552(5), there is no statute or court rule allowing for the taxation of the traveling expenses of attorneys or parties. See *McDonald v McDonald*, 45 Mich 44, 45-46; 7 NW 230 (1880) (observing that the traveling expenses of a party himself were not taxable as costs). We conclude that the trial court abused its discretion by awarding mileage expenses in the amount of $562.32 as an element of the costs taxed in this case. *Klinke*, *supra* at 518.

Plaintiff further argues that there was no legal authority permitting taxation of general "Copying Charges" in the amount of $300. Plaintiff is correct. No statute or court rule allows the taxation of expenses related to the general copying of documents.[5] See *Beach*, *supra* at 622-623. While the time spent by an attorney on activities such as the copying of documents may be awardable as attorney fees, the individual copying expenses are not awardable as taxable costs.

[5] MCL 600.2549 does allow for the taxation of costs "for the certified copies of documents or papers recorded or filed in any public office" if "the documents or papers were necessarily used." However, there is simply no indication that the $300 at issue here was spent for certified copies of official public documents.

Because no statute or court rule authorizes the taxation of general copying expenses, the trial court abused its discretion by awarding copying charges in the amount of $300 as an element of the costs taxed in this case. *Klinke*, *supra* at 518.

Plaintiff next argues that that there was no authority allowing the taxation of the case evaluation fee of $75. Plaintiff is again correct. Contrary to defendants' assertion, case evaluation fees are not specifically covered by MCL 600.2529. Indeed, this Court has specifically observed that case evaluation fees, formerly known as mediation fees, are not taxable as costs. *J C Bldg Corp II*, *supra* at 429. The trial court abused its discretion by awarding the case evaluation fee of $75 as an element of the taxed costs. *Klinke*, *supra* at 518.

Plaintiff also argues that there was no legal authority permitting the taxation of $35 for copying of the surveillance video. Plaintiff is correct. There is simply no statute or court rule that authorizes the taxation of costs for the copying of surveillance videos, and the trial court therefore abused its discretion by awarding this amount as an element of the costs taxed in this case. *Klinke*, *supra* at 518.

Lastly, plaintiff argues that there was no authority permitting the taxation of $41.06 for the copying of Dr. Hankenson's video deposition and $70 for the copying of the remaining doctors' video depositions. Although correct about the above-mentioned items, plaintiff is incorrect with respect to these two expenses. The costs of copying the video depositions at issue here were properly taxed because the depositions were filed in the clerk's office and used as evidence at trial. MCR 2.315(I); MCL 600.2549.

The trial court erred by allowing defendants to tax $3,629.07 in improper expenses. On remand, the trial

court shall modify the order taxing costs accordingly, by decreasing the amount of taxable costs from $10,768.18 to $7,139.11.

V. REASONABLENESS OF EXPERT WITNESS FEES

Plaintiff next argues that the trial court abused its discretion by allowing defendants to tax Dr. Chodoroff's expert witness fees of $4,142.50, which were charged at a rate of $500 an hour. We cannot agree.

A

We review for an abuse of discretion the trial court's determination of the proper amount of taxable expert witness fees. *Rickwalt*, *supra* at 466. An abuse of discretion occurs when the court's decision falls outside the range of principled and reasonable outcomes. *Maldonado*, *supra* at 388.

B

The trial court allowed defendants to tax Dr. Chodoroff's expert witness fees in the amount of $4,142.50. Those expert witness fees were charged at a rate of $500 an hour. As noted previously, "MCL 600.2164(1) authorizes a trial court to award expert witness fees as an element of taxable costs." *Rickwalt*, *supra* at 466. The trial court also has discretion under MCL 600.2164 to include fees for the expert's preparation time. *Herrera v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989).

Plaintiff argues that Dr. Chodoroff's hourly rate of $500 was "patently unreasonable." However, Dr. Hankenson, one of plaintiff's medical experts in this case, testified that he was paid $375 an hour for his deposition testimony. Dr. Hankenson is a family doctor and is

board-certified in family medicine only. In contrast, Dr. Chodoroff is a specialist who is board-certified in the fields of physical medicine and rehabilitation and electrodiagnostic medicine. In comparison to Dr. Hankenson's hourly rate of $375, Dr. Chodoroff's hourly rate of $500 does not strike us as "patently unreasonable."

In *Rickwalt*, the plaintiff sought to tax $5,184.80 in expert witness fees. *Rickwalt*, *supra* at 466. "[A]n itemized bill was presented to the trial court and . . . the parties argued regarding the propriety of specific items within the bill." *Id*. The record indicated that the expert had spent time preparing for his deposition testimony, establishing a case file, reviewing deposition testimony and notes, preparing a reconstruction of the decedent's death, and reviewing the mediation summaries. *Id*. The trial court "considered the breakdown of [the expert's] charges, ultimately finding appropriate the requested amounts of time [the expert] spent preparing for his testimony and trial, but reducing the requested hourly fees for [the expert's] trial preparation, from $130 an hour to $100 an hour, and trial time, from $200 an hour to $150 an hour." *Id*. at 466-467. Because the record "indicate[d] that the trial court considered and weighed the reasonableness of [the] requested expert witness fees," this Court concluded that the trial court's ultimate award of $4,196 had not constituted an abuse of discretion. *Id*. at 467.

Similarly in this case, the trial court observed during oral argument on the motion to tax costs that it had carefully considered the amount of expert witness fees that defendants sought to tax. After reviewing defendants' itemized bill of costs and listening to the parties' arguments, the court concluded that an award of expert witness fees for Dr. Chodoroff in the amount of $4,142.50 would not be unjustified. As in *Rickwalt*, the

record "indicates that the trial court considered and weighed the reasonableness of [the] requested expert witness fees." We cannot conclude that the trial court's ultimate award of $4,142.50 in expert witness fees for Dr. Chodoroff, at a rate of $500 an hour, fell outside the range of principled and reasonable outcomes. *Maldonado*, *supra* at 388.

VI. SANCTIONS PURSUANT TO MCR 2.114

Plaintiff lastly argues that the trial court erred by declining to sanction defendants pursuant to MCR 2.114. We disagree.

A

We review for clear error the trial court's determination whether to impose sanctions under MCR 2.114. *Contel Sys Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990). A decision is clearly erroneous when, although there may be evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *Id*.

B

Plaintiff contends that because there was no arguable legal basis for taxing certain of the costs sought by defendants in this case, the trial court should have sanctioned defendants under MCR 2.114. Pursuant to MCR 2.114(D), an attorney is under an affirmative duty to conduct a reasonable inquiry into both the factual and legal basis of a document before it is signed. *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). Under MCR 2.114(D), the signature of a party or an attorney is a certification that the document is "well grounded in fact and . . . war-

ranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law" and that "the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." The filing of a signed document that is not well grounded in fact and law subjects the filer to sanctions pursuant to MCR 2.114(E). *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 407; 651 NW2d 756 (2002). MCR 2.114(E) states that the trial court "shall" impose sanctions upon finding that a document has been signed in violation of the rule. Therefore, if a violation of MCR 2.114(D) has occurred, the sanctions provided for by MCR 2.114(E) are mandatory. *Contel Sys Corp*, *supra* at 710-711.

The taxation of costs in civil actions is generally governed by chapter 24 of the Revised Judicature Act, MCL 600.2401 *et seq*. Many of the statutes contained in this chapter are written in a cumbersome manner, and several of the statutes refer to other statutes to define which costs may actually be taxed. After reviewing this body of statutory law, we conclude that defendants likely honestly believed that many of the above-mentioned, disputed expenses were taxable as costs. Moreover, we do not find that the arguments presented by defendants in support of the requested costs were frivolous. Because defendants put forth reasonable arguments in support of their motion to tax costs, we cannot conclude that defendants' motion was frivolous or devoid of legal merit when made. See *Schadewald v Brulé*, 225 Mich App 26, 42; 570 NW2d 788 (1997), and *Attorney General v Harkins*, 257 Mich App 564, 576-577; 669 NW2d 296 (2003). The trial court did not clearly err by declining to sanction defendants under MCR 2.114.

VII. CONCLUSION

In Docket No. 277983, we affirm the jury's verdict of no cause of action. No error occurred requiring reversal. In Docket No. 279595, we affirm the trial court's specific award of expert witness fees and the trial court's denial of plaintiff's request to sanction defendants. However, we reverse the trial court's order taxing costs to the extent that it allows the taxation of $3,629.07 in improper expenses. On remand, the trial court shall modify the order taxing costs accordingly, by decreasing the amount of taxable costs from $10,768.18 to $7,139.11.

Affirmed in part, reversed in part, and remanded for modification of the order taxing costs consistent with this opinion. We do not retain jurisdiction. No costs under MCR 7.219, neither party having prevailed in full.

PEOPLE v MCGEE

Docket No. 279127. Submitted September 3, 2008, at Lansing. Decided September 16, 2008, at 9:10 a.m.

A Wayne Circuit Court jury convicted Anthony McGee of carjacking and assault with intent to rob while armed. The court, Craig S. Strong, J., sentenced the defendant to concurrent prison terms of 5 to 20 years. The defendant appealed.

The Court of Appeals *held*:

1. The defendant's convictions—which stemmed from a single incident in which the defendant brandished a handgun, told a car's occupant to get out of the car, and drove the car away—are not violative of federal and state constitutional protections against double jeopardy. Judicial examination of the scope of double jeopardy protections under the federal and state constitutions is confined to a determination of legislative intent. It is clear from the respective elements of the two offenses involved in this case that the Legislature intended to separately punish a defendant convicted of carjacking and assault with intent to rob while armed, even if the defendant committed the offenses in the same criminal transaction.

2. The defendant is not entitled to resentencing on the basis of a claimed misscoring of prior record variable 6, because the recommended minimum-sentence range would not change with a correct score.

Affirmed.

CRIMINAL LAW — DOUBLE JEOPARDY — CARJACKING — ASSAULT WITH INTENT TO ROB WHILE ARMED.

Convictions of both carjacking and assault with intent to rob while armed arising from one transaction are not violative of double jeopardy protections (US Const, Am V; Const 1963, art 1, § 15; MCL 750.89, 750.529a[1]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Carolyn M. Breen*, Assistant Prosecuting Attorney, for the people.

Mark R. Hall for the defendant.

Before: WHITBECK, P.J., and BANDSTRA and DONOFRIO, JJ.

PER CURIAM. Defendant Anthony McGee appeals as of right his jury conviction of carjacking[1] and assault with the intent to rob while armed.[2] The trial court sentenced McGee to concurrent terms of 5 to 20 years' imprisonment. We affirm. We decide this appeal without oral argument.[3]

I. BASIC FACTS

On March 5, 2007, at approximately 4:00 or 4:30 p.m., Roscoe Anderson was repairing a car in the parking lot of the apartment complex where he resided when McGee walked into the parking lot. McGee asked Anderson for a cigarette, and Anderson got into his vehicle to look for a cigarette in his coat pocket. McGee then reached into his coat, brandished a handgun, and told Anderson to "step out" of the car. Anderson felt surprised and threatened, and he complied with McGee's request. McGee got into the car and drove to the end of the parking lot where he picked up his girlfriend and then left the scene. McGee and his girlfriend turned themselves in to the police several days later.

II. DOUBLE JEOPARDY

A. STANDARD OF REVIEW

McGee argues that his convictions of both carjacking and assault with the intent to rob while armed violate

[1] MCL 750.529a(1).

[2] MCL 750.89.

[3] MCR 7.214(E).

the double jeopardy clauses of the state[4] and federal constitutions.[5] Because McGee raises these double jeopardy challenges for the first time on appeal, they are not preserved for appellate review.[6] However, a double jeopardy issue presents a significant constitutional question that will be considered on appeal regardless of whether the defendant raised it before the trial court.[7] We review an unpreserved claim that a defendant's double jeopardy rights have been violated for plain error that affected the defendant's substantial rights, that is, the error affected the outcome of the lower court proceedings.[8] Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.[9]

B. ANALYSIS

Both the United States and the Michigan constitutions protect a defendant from being placed twice in jeopardy, or subject to multiple punishments, for the same offense.[10] "Judicial examination of the scope of double jeopardy protection under both constitutions is confined to a determination of legislative intent."[11] And the validity of multiple punishments under the Michi-

[4] Const 1963, art 1, § 15.

[5] US Const, Am V.

[6] See *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

[7] *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002).

[8] *Meshell*, *supra* at 628.

[9] *Id*.

[10] US Const, Am V; Const 1963, art 1, § 15; *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007).

[11] *People v Parker*, 230 Mich App 337, 342; 584 NW2d 336 (1998).

gan Constitution is determined under the federal *Blockburger*[12] "same elements" standard.[13] If the Legislature clearly intended to impose multiple punishments, the imposition of multiple sentences is permissible regardless of whether the offenses have the same elements, but if the Legislature has not clearly expressed its intent, multiple offenses may be punished if each offense has an element that the other does not.[14] In other words, the test "emphasizes the elements of the two crimes."[15] " 'If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes . . . .' "[16]

In *People v Parker*, the defendant challenged his convictions of carjacking and armed robbery arising out of the same incident, arguing that these convictions violated his federal and state constitutional protections against double jeopardy.[17] The Court disagreed and affirmed his convictions, stating that the "[d]efendant's carjacking conviction stems from the taking of the automobile at gunpoint, whereas [the] defendant's armed robbery conviction stems from the subsequent taking of the victim's wallet and money at gunpoint."[18] On the basis of this stated rationale, McGee argues that his case is factually distinct from *Parker* because he stole only the car instead of also stealing the victim's

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[12] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

[13] *Smith*, *supra*; see also *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008).

[14] *Smith*, *supra* at 315-316.

[15] *Brown v Ohio*, 432 US 161, 166; 97 S Ct 2221; 53 L Ed 2d 187 (1977).

[16] *Id*., quoting *Iannelli v United States*, 420 US 770, 785 n 17; 95 S Ct 1284; 43 L Ed 2d 616 (1975).

[17] *Parker*, *supra* at 341-342.

[18] *Id*. at 342.

personal property. In other words, McGee argues that, because the targeted property was only the car itself, both of his convictions are supported by entirely the same evidence and, thus, are violative of the double jeopardy protections. We disagree.

In *Parker*, the Court differentiated the elements of the two crimes, stating, "It is clear from the language of the carjacking statute that the Legislature intended to prohibit takings accomplished with force or the mere threat of force. In contrast, it is clear from the language of the armed robbery statute that the Legislature intended to prohibit takings accomplished by an assault and the wielding of a dangerous weapon."[19] Here, although the jury convicted McGee of assault with intent to rob while armed, rather than armed robbery, as in *Parker*, the same logic applies.[20] The carjacking statute has no requirement that a weapon be used.[21] In contrast, the assault with the intent to rob while armed statute does have as a requirement the use of a

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[19] *Id*. at 343.

[20] In several unpublished opinions, this Court has rejected double jeopardy challenges to convictions of assault with intent to rob while armed and carjacking or attempted carjacking. *People v Lollio*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2003 (Docket No. 241431); *People v Copeland*, unpublished opinion per curiam of the Court of Appeals, issued June 13, 2000 (Docket No. 212275); *People v Stevens*, unpublished opinion per curiam of the Court of Appeals, issued July 2, 1999 (Docket No. 207989). Although those cases are not precedentially binding, MCR 7.215(C)(1), their analyses are sound.

[21] MCL 750.529a(1) states:

> A person who in the course of committing a larceny of a motor vehicle *uses force or violence or the threat of force or violence, or who puts in fear* any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years. [Emphasis added.]

weapon.[22] Also, the assault with the intent to rob while armed statute does not require the larceny of a motor vehicle, as does the carjacking statute. While there may indeed be substantial overlap between the proofs offered by the prosecution to establish the crimes, the prosecution must nevertheless prove different elements under these statutory provisions. Moreover, the Legislature specifically authorized two separate convictions arising out of the same transaction in the carjacking statute.[23] Therefore, it is clear that the Legislature intended to separately punish a defendant convicted of both carjacking and assault with the intent to rob while armed, even if the defendant committed the offenses in the same criminal transaction.[24] Accordingly, because the Legislature intended multiple punishments for these two different criminal actions, McGee's convictions do not violate his constitutional protections against double jeopardy.

III. SENTENCING

McGee claims that he is entitled to resentencing because the trial court incorrectly scored 20 points for prior record variable (PRV) 6 as a result of his relation-

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[22] MCL 750.89 states:

> Any person, *being armed with a dangerous weapon*, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years. [Emphasis added.]

[23] MCL 750.529a(3) states: "A sentence imposed for a violation of this section may be imposed to run consecutively to any other sentence imposed for a conviction that arises out of the same transaction." See also *Parker, supra* at 343-344.

[24] See *Parker*, *supra* at 344-345.

ship with the juvenile system at the time of the instant offenses. However, we hold that, even assuming that the PRV was misscored, the error was harmless because the recommended minimum sentence range of the sentencing guidelines would not change. Therefore, McGee is not entitled to resentencing.[25]

Affirmed.

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[25] See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

MILLER v MALIK

Docket No. 277952. Submitted June 3, 2008, at Detroit. Decided September 18, 2008, at 9:00 a.m.

Nancy Miller, as personal representative of the estate of her deceased husband, William Miller, brought a wrongful-death, medical-malpractice action in the Oakland Circuit Court against Ghaus Malik, M.D., Susan E. Oshnock, P.A.-C., Henry Ford Health System, Ashok Prasad, M.D., and William Beaumont Hospital. The plaintiff made the following allegations. Malik had performed a cervical disketomy on the decedent at Beaumont Hospital. The decedent complained of numbness in his legs after the surgery, and he was required to wear thromboembolic deterrent hose, but discontinued wearing them after finding them too small and uncomfortable. Pneumatic compression devices were ordered but not applied. The decedent was discharged from Beaumont Hospital without any order for deep vein thrombosis (DVT) prophylaxis or information about DVT symptoms. When the numbness persisted, the plaintiff called Malik's office and spoke to Oshnock, who told the plaintiff that the decedent need not see Malik. The defendant then telephoned Prasad, the decedent's primary-care physician, who made a diagnosis of cellulitis and prescribed antibiotics. During an appointment at Prasad's office four days after the telephone call, the decedent went into cardiac arrest and was pronounced dead on arrival at Botsford General Hospital. The court, Denise Langford Morris, J., granted summary disposition for the defendants, ruling that the plaintiff's notice of intent to file suit and affidavits of merit were insufficient and that the action was barred by the statute of limitations. The plaintiff appealed.

The Court of Appeals *held*:

1. The defendants did not waive their right to challenge the notice of intent. All the defendants, except for Beaumont Hospital, raised the statute of limitations and the inadequacy of the notice of intent in their affirmative defenses, citing MCL 600.2912b. Beaumont Hospital, in its affirmative defenses, asserted that the plaintiff's claim was barred by the statute of limitations without referring to MCL 600.2912b or otherwise specifically challenging the notice of intent. However, a defendant is not obligated to

challenge the sufficiency of a plaintiff's notice of intent pursuant to MCL 600.2912b until the plaintiff has raised the issue of the tolling provision of MCL 600.5856, which necessarily occurs after the defendant has raised the statute of limitations as a defense in its first responsive pleading. Beaumont Hospital did not waive its right to challenge the notice of intent.

2. MCL 600.2912b(4) requires a notice of intent to contain, among other things, a statement of the manner in which it is alleged the breach of the standard of practice or care caused the injury claimed in the notice. It is not sufficient to state that the defendants' negligence caused the alleged harm; rather, the plaintiff must describe the manner in which the actions or lack thereof caused the complained-of injury. The notice of intent in this case failed to describe the manner in which any failure on the part of any defendant to perform any of the alleged duties caused the decedent's DVT, pulmonary embolism, or death. The trial court correctly ruled that the notice of intent was insufficient.

3. The trial court correctly determined that the plaintiff's action is barred by the statute of limitations. An insufficient notice of intent does not toll the limitations period pursuant to MCL 600.5856(a). While the filing of a complaint and a deficient affidavit of merit tolls the limitations period until the affidavit is determined to be invalid in a subsequent proceeding, a plaintiff who serves an insufficient notice of intent lacks authority to file a complaint and affidavit of merit and is thus precluded from filing a complaint that tolls the limitations period.

Affirmed.

O'CONNELL, J., dissenting, stated that the factual information in the notice of intent—viewed in conjunction with the statement that the defendants breached their respective standard of care by failing to adequately assess and address the decedent's risk of DVT, failing to adequately prevent the decedent from developing DVT after his operation through the use of DVT prophylaxis, and failing to examine the decedent or recommend emergency care in conjunction with failing to recognize the common symptoms of DVT in a patient at high risk of developing the condition—fulfills the purposes of MCL 600.2912b by informing the defendants of the plaintiff's belief that the defendants' failure to do these things resulted in the decedent's death. Because the specificity requirements for a notice of intent under MCL 600.2912b are applicable to the affidavit of merit requirements under MCL 600.2912d, the plaintiff's affidavits of merit, with the exception of an affidavit from a registered nurse that did not contain a sufficient statement

on proximate cause, contained sufficient statements of proximate causation. The trial court erred by ruling that the affidavits were insufficient, except for that of the registered nurse. The proper remedy when an affidavit of merit is deficient is dismissal of the action without prejudice. To the extent any of the plaintiff's claims should be dismissed because of the deficient affidavit of merit, those claims should be dismissed without prejudice. The trial court's decision should be reversed and the case remanded.

1. NEGLIGENCE — MEDICAL MALPRACTICE — NOTICES OF INTENT TO FILE SUIT — AFFIRMATIVE DEFENSE.

A medical-malpractice defendant is not obligated to challenge the sufficiency of a plaintiff's notice of intent to sue until the plaintiff has raised the issue of the tolling provision of MCL 600.5856, which necessarily occurs after the defendant has raised the statute of limitations as a defense in its first responsive pleading (MCL 600.2912b).

2. NEGLIGENCE — MEDICAL MALPRACTICE — NOTICES OF INTENT TO FILE SUIT — PROXIMATE CAUSE.

A notice of intent to file a medical-malpractice suit must contain, among other things, a statement of the manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice; it is not sufficient to state that the defendant's negligence caused the alleged harm; the plaintiff must describe the manner in which the actions or lack thereof caused the complained-of injury (MCL 600.2912b[4]).

3. NEGLIGENCE — MEDICAL MALPRACTICE — NOTICES OF INTENT TO FILE SUIT — STATUTE OF LIMITATIONS.

An insufficient notice of intent to file a medical-malpractice suit does not toll the period of limitations for that suit (MCL 600.2912b, 600.5805[6], 600.5856[a]).

McKeen & Associates, P.C. (by *Brian J. McKeen* and *Ramona C. Howard*), for Nancy Miller.

Willmarth, Ramar & Paradiso, P.C. (by *John J. Ramar*), for Ghaus Malik, M.D., Susan E. Oshnock, P.A.-C., and Henry Ford Health System.

Tanoury, Corbet, Shaw, Nauts & Essad, P.L.L.C. (by *Linda M. Garbarino* and *David R. Nauts*), for Ashok Prasad, M.D.

O'Connor, DeGrazia, Tamm & O'Connor, P.C. (by *Julie McCann O'Connor*), for William Beaumont Hospital.

Before: WHITBECK, P.J., and O'CONNELL and KELLY, JJ.

KELLY, J. This wrongful-death, medical-malpractice case primarily concerns whether plaintiff's notice of intent required under MCL 600.2912b was sufficient with respect to defendants, Ghaus Malik, M.D., Susan E. Oshnock, P.A.-C., Henry Ford Health System, doing business as Neurosurgery Associates-Oakland (Henry Ford), Ashok Prasad, M.D., and William Beaumont Hospital (Beaumont). Plaintiff, as personal representative of the estate of her deceased husband, William Miller (Miller), appeals as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(7) (claim barred by statute of limitations). We affirm.

I. BASIC FACTS AND PROCEEDINGS

Malik, a neurosurgeon, performed a cervical diskectomy on Miller at Beaumont. Miller experienced numbness in his legs after the surgery. Miller was transferred to Beaumont's rehabilitation unit for physical and occupational therapy, and he was required to wear TED hose,[1] but he removed them because they were too small and uncomfortable. Pneumatic compression devices were ordered (presumably to promote blood flow in the

[1] TED is an abbreviation for thromboembolic deterrent, and TED hose are tightly fitting stockings designed to promote circulation.

legs), but they were never applied. Beaumont physicians and nurses did not record any reports of calf tenderness by Miller or other signs or symptoms of deep vein thrombosis (DVT). Miller was discharged, and his discharge orders did not include DVT prophylaxis or information about symptoms.

Miller continued to experience numbness after going home, and he fell on one occasion. His legs became red, shiny, and swollen, and plaintiff repeatedly called Malik's office. However, Oshnock, a certified physician's assistant, allegedly told her that Miller did not need to see Malik. Plaintiff called Prasad, Miller's internist and primary care provider, and Prasad scheduled an appointment for four days later, on September 19, 2003. Prasad initially diagnosed cellulitis over the telephone and prescribed antibiotics. On the day of his appointment, Miller went to Prasad's office, where he went into cardiac arrest. Miller was taken to Botsford General Hospital, where he was pronounced dead upon arrival. An autopsy revealed that Miller died of a pulmonary embolism from a DVT in his leg.

Pursuant to MCL 600.2912b, plaintiff mailed a notice of intent to file a claim to each defendant on April 22, 2005. As required by § 2912b(4), plaintiff included in her notice of intent a statement of proximate causation, which stated the following: "Had the standard of care been complied with in a timely and appropriate manner, William Miller's deep vein thrombosis would have been avoided and/or timely diagnosed and treated, thereby avoiding his demise from pulmonary embolism." After 182 days, in October 2005, plaintiff alleged a wrongful-death claim based on medical malpractice against defendants and filed affidavits of merit. All defendants moved for summary disposition, challenging the proximate causation statements in the notice of intent

and affidavits of merit. The trial court concluded that the notice of intent and affidavits of merit were insufficient, and because the statutory period of limitations had expired, it granted defendants summary disposition.

II. WAIVER

Plaintiff argues that defendants waived their right to challenge the notice of intent pursuant to MCR 2.111(F)(2)[2] because they failed to plead this defense in their affirmative defenses, as required by subsection F(3)[3] of that rule. We disagree.

All defendants, except Beaumont, specifically raised the statute of limitations and the inadequacy of the notice of intent in their affirmative defenses, citing MCL 600.2912b. As our Supreme Court stated in *Burton v Reed City Hosp Corp*, 471 Mich 745, 755; 691 NW2d 424 (2005), where almost identical affirmative defenses were pleaded, "[s]uch a direct assertion of these defenses by defendants can by no means be considered a waiver."

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[2] MCR 2.111(F)(2) provides:

> A party against whom a cause of action has been asserted by complaint, cross-claim, counterclaim, or third-party claim must assert in a responsive pleading the defenses the party has against the claim. A defense not asserted in the responsive pleading or by motion as provided by these rules is waived . . . .

[3] MCR 2.11(F)(3) pertains specifically to affirmative defenses and states:

> Affirmative defenses must be stated in a party's responsive pleading . . . . Under a separate and distinct heading, a party must state facts constituting
>
> (a) an affirmative defense, such as . . . statute of limitations . . . .

Beaumont asserted in its affirmative defenses that plaintiff's claim was barred by the applicable statute of limitations, without referring to MCL 600.2912b or otherwise specifically challenging the notice of intent. However, a defendant is not obligated to challenge the sufficiency of a plaintiff's notice of intent pursuant to MCL 600.2912b until the plaintiff has raised the issue of the tolling provision of MCL 600.5856, which necessarily occurs after the defendant has raised a statute of limitations defense in its first responsive pleading. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 70 n 7; 642 NW2d 663 (2002) (*Roberts I*). Therefore, Beaumont did not waive its right to challenge the notice of intent. Although a party may waive a statute of limitations defense by its course of action and conduct, plaintiff has identified no acts or conduct on the part of any defendant that amount to waiver. *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 665; 741 NW2d 857 (2007).

III. SUFFICIENCY OF THE NOTICE OF INTENT

Plaintiff next contends that the trial court erred by ruling that the proximate causation statement in her notice of intent was deficient and, because the period of limitations had expired, the deficiency in the notice of intent could not be cured and summary disposition was appropriate for defendants. We disagree.

This Court reviews de novo a motion for summary disposition pursuant to MCR 2.116(C)(7). *Trentadue v Buckler Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007). In the absence of disputed facts, we also review de novo whether the applicable statute of limitations bars a cause of action. *Id.* This Court considers "all affidavits, pleadings, and other documentary evidence submitted by the parties and construe[s]

the pleadings in [the] plaintiff's favor." *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 638; 692 NW2d 398 (2004). Furthermore, we accept as true the complaint's contents unless contradicted by documentary evidence provided by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

The period of limitations in a malpractice action is two years. MCL 600.5805(6). In order to initiate the lawsuit, the claimant must provide the defendant with a notice of intent to file suit at least 182 days before filing the complaint. MCL 600.2912b(1). If a claim would become barred under the statute of limitations during this 182-day waiting period after the notice of intent is served, then the statute is tolled for the "number of days remaining in the applicable notice period after the date notice is given." MCL 600.5856(c). However, if it is determined that the notice of intent is deficient, then the notice of intent will not function to toll the statute, *Roberts I*, *supra* at 64, because, in effect, the claimant has not commenced the action, *Boodt v Borgess Med Ctr*, 481 Mich 558, 563; 751 NW2d 44 (2008) (*Boodt II*).

In the present matter, Miller passed away on September 19, 2003. Accordingly, the two-year period of limitations would expire on September 19, 2005. See MCL 600.5805(6). Plaintiff filed her notice of intent on April 22, 2005, and her complaint and affidavits of merit 182 days later, on October 21, 2005. Given these facts, plaintiff's notice of intent tolled the statute of limitations and her claim was properly before the court, presuming that her notice of intent was sufficient. See *Roberts I*, *supra* at 64; MCL 600.5856(c).

However, in order for a notice of intent to be sufficient, it must contain all the information required

under § 2912b(4). See *Boodt II*, *supra* at 562-563. That provision provides the following:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The *manner in which* it is alleged *the breach of the standard of practice or care was the proximate cause of the injury* claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim. [Emphasis added.]

A claimant must present this information "with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them." *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 701; 684 NW2d 711 (2004) (*Roberts II*). Although some of the information supplied in the notice of intent will evolve as discovery proceeds, a claimant is "required to make good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings." *Id.* (emphasis in original). With respect to causation, it is not sufficient to state that the defendants' negligence caused the alleged harm. *Id*. at 699 n 16. Rather, the claimant must describe the manner in which the ac-

tions or lack thereof caused the complained-of injury. *Boodt II*, *supra* at 560. Further, no portion of the notice of intent may be read in isolation; rather, the notice of intent must be read as a whole. *Boodt v Borgess Med Ctr*, 272 Mich App 621, 628, 630; 728 NW2d 471 (2006) (*Boodt I*), rev'd in part on other grounds 481 Mich 558 (2008).

In the instant case, the standard of care portion of the notice of intent (paragraph II) identified the following duties with respect to all defendants: obtain patient histories and perform a physical examination, recognize the signs and symptoms of DVT and the need to immediately examine a patient exhibiting these signs and symptoms, obtain Doppler studies of the lower extremities, immediately refer a patient with the signs and symptoms of DVT to the emergency room, and "any and all acts of negligence identified through additional discovery." With respect to Malik, Oshnock, Henry Ford, and Beaumont, plaintiff averred that they had the following additional duties: order appropriate DVT prophylaxes, ensure the proper use of anti-embolitic stockings or pneumatic compression devices, assess lower extremities, order laboratory studies, and find alternative DVT prophylaxes when the appropriate size stockings are not available. Plaintiff asserted that Malik and Oshnock also had a duty to be readily available to, and communicate with, other medical personnel. Regarding Henry Ford and Beaumont, plaintiff averred that they had the following additional duties: select, employ, train, and monitor their employees, agents, and staff, ensure that appropriate policies and procedures are adopted and enforced, and ensure proper communication among medical personnel. Plaintiff averred that Beaumont also had a duty to inform the appropriate personnel when an alternative method of DVT prophylaxis is necessary. In claiming that defendants had

breached the applicable standard of practice or care, plaintiff stated, "There was a failure to do all things listed in paragraph II above." With respect to the actions that defendants should have taken to comply with the standard of practice or care, plaintiff simply stated, "See paragraph II above." Regarding the manner in which the alleged breach was a proximate cause of the claimed injury, plaintiff asserted, "Had the standard of care been complied with in a timely and appropriate manner, William Miller's deep vein thrombosis would have been avoided and/or timely diagnosed and treated, thereby avoiding his demise from pulmonary embolism."

Although plaintiff stated that the DVT and Miller's subsequent death would have been avoided if the standard of care had been followed, nowhere did she state how any defendant failed to prevent, diagnose, or treat the DVT or pulmonary embolism. The reader is left to wonder whether plaintiff is alleging that the DVT could have been prevented, whether a diagnosis of the DVT could have been made in time to avoid the pulmonary embolism, or whether the pulmonary embolism could have been diagnosed or treated in time to avoid Miller's death. See *Roberts II*, *supra* at 699. Plaintiff identified many duties in the standard of care portion of the notice of intent, but she failed to describe the manner in which any failure on the part of any defendant to perform any of these duties caused Miller's DVT, pulmonary embolism, or death. For example, plaintiff asserted that all defendants had a duty to recognize the signs and symptoms of DVT. However, she never identified these signs or symptoms or stated which, if any, Miller exhibited or how recognition of them would have prevented Miller's pulmonary embolism or death. Similarly, plaintiff never indicated how a history, physical examination, Doppler study, DVT prophylaxis, laboratory study, or alternative prophylaxes to TED hose

would have prevented Miller's DVT, pulmonary embolism, or death. The notice of intent provides that all defendants had a duty to refer a patient with signs and symptoms of DVT to the emergency room, but plaintiff failed to state what treatment might have been initiated or how emergency room personnel would have prevented Miller's pulmonary embolism or death. With respect to Henry Ford and Beaumont, plaintiff asserted that they had several duties regarding policies and procedures, but she failed to identify how any breach of these duties caused Miller's DVT, pulmonary embolism, or death. Reading the notice of intent as a whole and taking into account the duties listed in the standard of care portion, the reader cannot discern the manner in which any defendant's conduct or omission caused Miller's DVT, pulmonary embolism, or death.

While recognizing that the notice of intent is served in the early stage of proceedings, we do not believe that plaintiff provided good-faith averments of details that are responsive or particularized. See *Roberts II*, *supra* at 701. The notice of intent merely stated that Miller's DVT would have been avoided or treated and his death would have been avoided if defendants had complied with the standard of care. It is not sufficient "to merely state that defendants' alleged negligence caused an injury"; plaintiff must provide a statement regarding "the *manner* in which it is alleged that the breach was a proximate cause of the injury." *Id.* at 699 n 16 (emphasis in original). Plaintiff asserts that medical professionals understand that an untreated DVT can break loose, become an embolus, and cause respiratory arrest. In the context of the statement of the standard of care, our Supreme Court has stated that there may be situations, such as the amputation of the wrong limb, the extraction of the wrong tooth, or the failure to remove a surgical instrument from a patient's body,

where the burden required for the statement would be minimal. *Id.* at 694 n 12. However, plaintiff never stated how any defendant's failure to perform any duty caused Miller's DVT, pulmonary embolism, or death, and causation is not obvious to a casual observer. Because plaintiff failed to connect Miller's DVT, pulmonary embolism, or death to the conduct of any defendant in any meaningful way, the notice of intent failed to sufficiently put defendants on notice of the nature of the claim. *Id.* at 701. Accordingly, the trial court properly determined that the notice of intent was insufficient.

Plaintiff asserts that defendants answered her complaint, which contained the same factual allegations and breaches of the standard of care as the notice of intent, and filed affidavits of meritorious defense, which demonstrates that they understood the claims against them. However, a notice of intent requires more than merely apprising the potential defendant of the "nature and gravamen" of the plaintiff's allegations; it requires a statement of the " 'manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.' " *Boodt II*, *supra* at 560-561, quoting MCL 600.2912b(4)(e).

Plaintiff contends that the appropriate remedy for an invalid notice of intent is dismissal without prejudice. Our Supreme Court recently decided *Kirkaldy v Rim*, 478 Mich 581, 585-586; 734 NW2d 201 (2007), in which it held that a complaint and affidavit of merit toll the limitations period pursuant to MCL 600.5856(a) until the affidavit is determined to be invalid in a subsequent proceeding. However, an insufficient notice of intent does not toll the limitations period. *Boodt II*, *supra* at 561. Rather, if the notice of intent is lacking, the

plaintiff is not yet authorized to file a complaint and affidavit of merit, and the limitations period cannot be tolled. *Id.* at 562-563. We therefore affirm the trial court's grant of summary disposition.

IV. SUFFICIENCY OF THE AFFIDAVITS OF MERIT

Plaintiff also asserts that the trial court erred by ruling that the proximate causation statements in her affidavits of merit were deficient and by granting summary disposition. Given our conclusion that summary disposition was properly granted regarding the notice of intent and that plaintiff was not yet authorized to file the complaint and affidavits of merit, we need not address this issue.

Affirmed.

WHITBECK, P.J., concurred.

O'CONNELL, J. (*dissenting*). I respectfully dissent. I would hold that plaintiff's notice of intent and affidavits of merit, with the exception of one, were sufficient and would reverse and remand.

According to plaintiff, on August 12, 2003, William Miller (Miller) had surgery at William Beaumont Hospital (Beaumont). Defendant Ghaus Malik, M.D., performed the cervical diskectomy. After the surgery, Miller experienced lower extremity numbness. On August 19, 2003, Miller was transferred to the rehabilitation unit for therapy and was discharged on August 27, 2003. Even with rehabilitation, Miller spent a great deal of time in bed.

At home, Miller experienced lower extremity numbness and had fallen. His legs were red, shiny, and swollen. Plaintiff contacted defendant Malik's office for an appointment, but was told by defendant Susan E.

Oshnock, defendant Malik's physician's assistant, that Miller did not need to see defendant Malik. Plaintiff then called Miller's primary care physician, defendant Ashok Prasad. Defendant Prasad agreed to see Miller about four days after he was initially contacted. On September 19, 2003, while at defendant Prasad's office, Miller went into cardiac arrest and was pronounced dead at Botsford General Hospital. An autopsy concluded that a pulmonary embolism was the cause of death.

On April 22, 2005, plaintiff sent a notice of intent to defendants. She then filed her complaint in October 2005, along with the affidavits of merit. Defendants filed for summary disposition, alleging the documents lacked the specificity required in their proximate causation statements. The trial court agreed and granted summary disposition and dismissed the action with prejudice.

MCL 600.2912b(4) provides the requirements for a notice of intent:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) *The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.*

> (f) The names of all health care professionals and health facilities the claimant is notifying under this section in relation to the claim. [Emphasis added.]

The claimant's statements need not be correct, but a good faith effort must be made to " 'set forth [the information] with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them.' " *Boodt v Borgess Med Ctr*, 272 Mich App 621, 626; 728 NW2d 471 (2006) (*Boodt I*), rev'd in part on other grounds 481 Mich 558 (2008) (*Boodt II*), quoting *Roberts v Mecosta Co Gen Hosp* (*After Remand*), 470 Mich 679, 701; 684 NW2d 711 (2002) (alteration in *Boodt*). Because discovery has not commenced at the time the notice is required, the details provided within the notice need only "allow the potential defendants to understand the claimed basis of the impending malpractice action . . . ." *Roberts*, *supra* at 691, 692 n 7.

Defendants' argument and the trial court's holding both rely on the fact that the paragraph following the heading, "THE MANNER IN WHICH THE BREACH WAS A PROXIMATE CAUSE OF THE CLAIMED INJURY," in the notice of intent reads in its entirety: "Had the standard of care been complied with in a timely and appropriate manner, William Miller's deep vein thrombosis would have been avoided and/or timely diagnosed and treated, thereby avoiding his demise from pulmonary embolism." However, the issue is not whether any particular section heading contains the required information, but whether, reviewing the notice in its entirety, the information is contained somewhere in the document. *Boodt I*, *supra* at 628. "Our analysis examines whether the *notice* contains the required information, not whether any specific portion of the notice does." *Id.* (emphasis in original).

Reviewing the notice of intent as a whole reveals that defendant Malik initially recognized that Miller was at risk for deep vein thrombosis (DVT), as evidenced by the ordering of thromboembolic deterrent (TED) hose and pneumatic compression devices, but the TED hose were too small and caused a breakdown in Miller's legs, causing the hose to be removed, and the pneumatic compression devices were never applied by the nurses. Defendant Malik failed to examine Miller at "appropriate intervals" to make certain his risk of DVT was being addressed, which resulted in Miller's developing DVT. Miller was at an increased risk for DVT because of orthopedic surgery, being sedentary, and having fallen at home, but Miller's discharge orders did not include DVT prophylaxis or instructions regarding the signs and symptoms of DVT. Miller exhibited classic symptoms of DVT as his legs were red, shiny, and swollen,[1] and such symptoms were described to defendants Malik, Oshnock, and Prasad, who should have easily recognized them as DVT symptoms in light of Miller's history and risk factors, but their failure to timely diagnose and treat Miller's DVT resulted in his death from a pulmonary embolism.[2]

In *Tousey v Brennan*, 275 Mich App 535, 539-542; 739 NW2d 128 (2007), this Court found a notice of intent sufficient even though its proximate cause statement was as follows: "Due to the negligence and/or breaches of the . . . standard of care or practice by [defendant, the decedent] suffered a life ending myocardial infarction." The notice of intent provided that the

[1] Although DVT can be symptomless, the symptoms include swelling in one or both legs, pain or tenderness in one or both legs, warmth in the skin of the affected leg, red or discolored skin in the affected leg, visible surface veins, and leg fatigue.

[2] It is common knowledge within the medical community that untreated DVT can result in pulmonary embolism.

defendant doctor had failed to hospitalize the decedent and obtain an angiogram and consultation, to begin using aspirin, heparin, and beta blockers, and to send a blood sample for testing. *Id.* at 541-542. The defendant doctor had seen the decedent for chest pains, drawn blood, and performed an electrocardiogram, and he concluded that the decedent had suffered a minor heart attack, scheduled an appointment with a cardiologist for four days later, and sent the decedent home, where he died two days later. *Id.* at 541.

This is similar to the present case, where plaintiff's notice of intent alleges that defendants Malik, Oshnock, and Prasad's failure to perform various examination and diagnostic tests resulted in Miller's being sent home with an undiagnosed condition that resulted in his death before he was able to ultimately make his appointment with defendant Prasad. The factual information, viewed in conjunction with the statement that defendants breached their applicable standard of care by failing to adequately assess and address Miller's risk of DVT, failing to adequately prevent Miller from developing DVT after his operation through the use of DVT prophylaxes, and failing to examine Miller or recommend emergency care in conjunction with failing to recognize the common symptoms of DVT in a patient clearly at high risk for developing such a condition, "fulfills the purpose of MCL 600.2912b by informing defendants of plaintiff's belief that [defendants'] failure to do these things resulted in [decedent's death]." *Id.* at 542.

That the chain of causation in this case involves multiple errors that combined to create the result does not render the notice of intent invalid. It is clear from the notice of intent that plaintiff is alleging that the failure to prevent DVT initially, combined with the later

failure to diagnose and treat Miller's DVT, resulted in Miller's death from pulmonary embolism, a known result of untreated DVT. There "is no real guesswork" required to come to the conclusions that the notice of intent asserts: (1) defendant Malik should have known that Miller was at an increased risk for DVT, and the failure to use replacement DVT preventive measures for the TED hose, as well as the failure of defendant Beaumont's nurses to use the compression devices, would and did result in Miller's developing DVT and (2) defendants Malik, Oshnock, and Prasad's failure to recognize both the obvious symptoms of DVT and Miller's increased risk of developing DVT, and their complete failure to diagnose and provide any treatment for Miller's DVT or even tell plaintiff that Miller ought to seek emergency care, resulted in Miller's DVT going untreated and getting worse until the blood clot broke free, resulting in Miller's death from a pulmonary embolism. Defendants clearly understand the nature of the suit against them after reading the notice of intent here. *Roberts*, *supra* at 701.

Contrary to the majority's position, this case is distinguishable from *Boodt II*, as the present notice of intent contains a statement of "[t]he manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice." *Boodt II*, *supra* at 561, quoting MCL 600.2912b(4)(e). The statement in *Boodt II* stated, "If the standard of care had been followed, [the decedent] would not have died on October 11, 2001." *Id.* at 560. The statement contained in the present notice of intent goes further. It states, "Had the standard of care been complied with in a timely and appropriate manner, William Miller's deep vein thrombosis would have been avoided and/or timely diagnosed and treated, thereby avoiding his demise from pulmonary embolism." Thus,

the notice specifically stated the "manner in which [the failure to follow the standard of care] was the proximate cause of the injury claimed in the notice"—namely, failing to follow the standard of care resulted in Miller's developing DVT and in the DVT going undiagnosed and untreated, resulting in the pulmonary embolism that killed him. See *id.* at 560 n 1. Accordingly, I would conclude that the trial court erred by finding plaintiff's notice of intent insufficient.

Plaintiff also argues that the trial court erred by concluding that the proximate cause statements in her affidavits of merit were also insufficient. I agree. This Court has held that the specificity requirements for a notice of intent under MCL 600.2912b, as set forth in *Roberts*, *supra* at 691-692, are applicable to affidavit of merit requirements under MCL 600.2912d. *King v Reed*, 278 Mich App 504, 516-517; 751 NW2d 525 (2008). To the extent that the affidavits of merit contain the same information as the notice of intent, reviewing the affidavits of merit as a whole, they also contain sufficient statements of proximate cause. However, the affidavit of Loretta Mathews, R.N., does not contain a proximate causation statement as required by MCL 600.2912d(1)(d), making it deficient. Accordingly, the trial court also erred by ruling that plaintiff's affidavits of merit were insufficient, except for that of Mathews.

Because I determined that Mathews's affidavit was insufficient, I also address whether the trial court properly dismissed plaintiff's claims with prejudice. In *Kirkaldy v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007), the Michigan Supreme Court held that "if a defendant believes that an affidavit is deficient, the defendant must challenge the affidavit. If that challenge is successful, the proper remedy is dismissal *without* prejudice." (Emphasis added). To the extent

that any of plaintiff's claims remain dismissed as a result of Mathews's insufficient affidavit, I would reverse the trial court's dismissal with prejudice and instruct the trial court to enter an order dismissing those claims without prejudice, pursuant to *Kirkaldy*.

Because I conclude that the notice of intent and all but one of the affidavits of merit are sufficient and that, to the extent Mathews's insufficient affidavit resulted in the dismissal of plaintiff's claims, the proper remedy was dismissal without prejudice, I would reverse and remand.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered August 20, 2008:

CITIZENS PROTECTING MICHIGAN'S CONSTITUTION v SECRETARY OF STATE, Docket No. 286734. The Court orders that the relief sought in the complaint for a writ of mandamus is granted. *Michigan United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 365-366 (2001). Reform Michigan Government Now! (RMGN) has submitted its proposal under the initiative petition procedure that Const 1963, art 12, § 2, establishes for amending the constitution. However, the proposal is a "general revision" of the constitution that can be accomplished only under Const 1963, art 12, § 3. Therefore, the constitutional power of initiative does not extend to the proposal. Consequently, the RMGN initiative petition does not meet the constitutional prerequisites for acceptance. As a result, the Secretary of State and the Board of State Canvassers are ordered and directed to stop the canvass, to reject the RMGN initiative petition, and to not allow the proposal to be placed on the ballot. *Leininger v Secretary of State*, 316 Mich 644 (1947); *City of Jackson v Comm'r of Revenue*, 316 Mich 694 (1947), citing *Leininger, supra*; see *Michigan United Conservation Clubs, supra*. See also MCR 7.216(A)(7).

The motion for stay is denied. This order shall be effective immediately. We retain jurisdiction.

Order Entered August 28, 2008:

PEOPLE v DAVENPORT, Docket No. 271366. Pursuant to the opinion issued concurrently with this order, this case is remanded for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 28 days of the clerk's certification of this order, and they shall be given priority on remand until they are concluded.

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1. The constitution establishes separate methods for an amendment of and a general revision of the constitution; the provisions are not alternatives and the procedure for amending the constitution cannot be used to effectuate a general revision of the constitution (Const 1963, art 12, §§ 2, 3). *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273.

2. A court must consider both the quantitative nature and the qualitative nature of proposed constitutional changes in order to determine whether a proposal effects a general revision of the constitution and is therefore not subject to the initiative process established for amending the constitution; the determination depends on not only the number of proposed changes, but the scope of the proposed changes and the degree to which those changes would interfere with or modify the operation of government (Const 1963, art 12, §§ 2, 3). *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273.

EQUAL PROTECTION

3. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp (On Remand)*, 280 Mich App 449.

EX POST FACTO LAWS

4. An ex post facto law, which is prohibited by the United States and Michigan constitutions, is one that attaches legal consequences to acts before the law's effective date and works to the disadvantage of a criminal defendant (US Const, art I, § 10, cl 1; Const 1963, art 1, § 10). *People v Perkins*, 280 Mich App 244.

CONTRIBUTIONS TO POLITICAL ACTION COMMITTEES—*See*

ELECTIONS 2

COSTS

EXPERT-WITNESS FEES

1. A trial court may award expert-witness fees, including fees for the expert's preparation time, as an element of taxable costs (MCL 600.2164). *Guerrero v Smith*, 280 Mich App 647.

TAXATION OF COSTS

2. A trial court's ruling on a prevailing party's motion to tax costs is reviewed on appeal for abuse of discretion; however, whether a particular expense is taxable as a cost is a question of law (MCR 2.625). *Guerrero v Smith*, 280 Mich App 647.

COURT-APPOINTED ATTORNEYS—*See*

CRIMINAL LAW 1

COURTS

See, also, PARENT AND CHILD 3, 4

JURISDICTION

1. *Hernandez v Ford Motor Co*, 280 Mich App 545.

SUPPLEMENTAL JURY INSTRUCTIONS

2. A trial court's decision on a request for supplemental jury instructions is reviewed on appeal for abuse of discretion; a decision will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice. *Guerrero v Smith*, 280 Mich App 647.

CRIMINAL LAW

ATTORNEY AND CLIENT

1. A court must consider a defendant's present and future ability to pay before ordering the defendant in a criminal case to reimburse the expenses for court-appointed counsel (MCL 769.1k[b][*iii*]). *People v Trapp*, 280 Mich App 598.

CRIMINAL SEXUAL CONDUCT

2. *People v Wilcox*, 280 Mich App 53.

DOUBLE JEOPARDY

3. Convictions of both carjacking and assault with intent to rob while armed arising from one transaction are not violative of double jeopardy protections (US Const, Am V; Const 1963, art 1, § 15; MCL 750.89, 750.529a[1]). *People v McGee*, 280 Mich App 680.

EVIDENCE

4. Evidentiary errors are nonconstitutional in nature. *People v Blackmon*, 280 Mich App 253.

PROSECUTORIAL MISCONDUCT

5. Prosecutorial misconduct, in order to be constitutional error, must so infect the trial with unfairness as to make the conviction a deprivation of liberty without due process of law. *People v Blackmon*, 280 Mich App 253.

PROSECUTORS

6. If a lawyer who has represented a defendant in a criminal prosecution joins the prosecutor's office while the criminal prosecution remains pending, the entire prosecutor's office will be presumed to be privy to the confidences obtained by the former defense lawyer; to rebut the presumption of shared confidences, the prosecutor must

show that effective screening procedures have been used to isolate the defendant's former counsel from the prosecution of the case; the screening procedures should take into account the size of the office, the structural organization of the office, the likelihood of contact between the attorney with the conflict of interest and the personnel involved in the ongoing prosecution, and the existence of rules that prevent the attorney with the conflict of interest from accessing files or information pertaining to the case (MRPC 1.9, 1.10, 1.11[c]). *People v Davenport*, 280 Mich App 464.

SEX OFFENDERS REGISTRATION ACT

7. A court must consider the particular facts of a criminal violation to determine whether the violation by its nature constitutes a sexual offense against an individual who is less than 18 years of age for purposes of the Sex Offenders Registration Act (MCL 28.722[e][*xi*]). *People v Althoff*, 280 Mich App 524.
8. The possession of pornographic photographs of a child constitutes an offense against an individual who is less than 18 years of age for purposes of the Sex Offenders Registration Act (MCL 752.365; MCL 28.722[e][*xi*]). *People v Althoff*, 280 Mich App 524.

CRIMINAL SEXUAL CONDUCT—*See*

CRIMINAL LAW 2
SENTENCES 1

DEFAULT JUDGMENTS—*See*

JUDGMENTS 1, 2, 3

DEPARTMENT OF NATURAL RESOURCES—*See*

MUNICIPAL CORPORATIONS 1

DEPARTMENT OF TREASURY—*See*

TAXATION 1

DEVIATIONS FROM CHILD-SUPPORT FORMULA—*See*

PARENT AND CHILD 2

DISABILITY—*See*

WORKERS' COMPENSATION 3

DIVORCE

CHILD CUSTODY

1. *Jamil v Jahan*, 280 Mich App 92.

DOUBLE JEOPARDY—*See*

CRIMINAL LAW 3

DUE PROCESS OF LAW—*See*

CRIMINAL LAW 5

DUPLICATE PAYMENT OF INSURANCE BENEFITS—*See*

INSURANCE 3

DUTIES OF INSURANCE AGENTS—*See*

INSURANCE 1

DUTY TO READ INSURANCE POLICIES—*See*

INSURANCE 2

ELECTIONS

JUDICIAL OFFICE

1. *Martin v Secretary of State*, 280 Mich App 417.

MICHIGAN CAMPAIGN FINANCE ACT

2. A public body makes an expenditure that is prohibited by the Michigan Campaign Finance Act if it administers a payroll-deduction plan for voluntary employee contributions to a political action committee regardless of whether it receives reimbursement for the administrative cost of such a plan (MCL 169.206[1], 169.257). *Mich Ed Ass'n v Sec of State*, 280 Mich App 477.

EMPLOYER'S REFUSAL TO PROVIDE TREATMENT TO INJURED EMPLOYEE—*See*

WORKERS' COMPENSATION 2

EQUAL PROTECTION—*See*

COSTITUTIONAL LAW 3

EVIDENCE

See, also, CRIMINAL LAW 2,4
SENTENCES 2

ADMISSIBILITY OF EVIDENCE

1. Evidence of settlement-related discussions is admissible for the purpose of proving undue delay (MRE 408). *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16.

APPEAL

2. Evidentiary error in civil cases is considered harmless unless declining to grant a new trial, set aside a verdict, or vacate, modify, or otherwise disturb a judgment or order appears to the reviewing court inconsistent with substantial justice. *Guerrero v Smith*, 280 Mich App 647.

EXPERT WITNESSES

3. The need for expert testimony in a negligence case involving issues of insurance coverage depends on the nature of the underlying claim against the insurance agent, and the trial court should determine the need on a case-by-case basis; expert testimony might be necessary if the duty allegedly breached falls beyond the average juror's understanding (MRE 702). *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16.

EX POST FACTO LAWS—*See*

CONSTITUTIONAL LAW 4

EXCLUSIVE, CONTINUING JURISDICTION—*See*

PARENT AND CHILD 5

EXPERT-WITNESS FEES—*See*

COSTS 1

EXPERT WITNESSES—*See*

EVIDENCE 3

FORUM NON CONVENIENS—*See*

COURTS 1

GENERAL REVISIONS—*See*

CONSTITUTIONAL LAW 1, 2

GOOD CAUSE—*See*

JUDGMENTS 2

GUARDIANSHIPS—*See*

INDIANS 2

HABITUAL OFFENDERS—*See*

SENTENCES 1

HARMFULLY NEGLECT

HEALTH 1

HEALTH

NURSING HOMES

1. The phrase "harmfully neglect," in the statutory provision that requires nursing-home administrators to report incidents of abuse, mistreatment, or harmful neglect to state authorities, means to fail to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness, either willfully or unintentionally (MCL 333.21771[1]). *People v Edenstrom*, 280 Mich App 75.
2. Nursing-home administrators must report incidents that there is reason to believe were caused by abuse, harmful neglect, or misappropriation (MCL 333.21771[2]). *People v Edenstrom*, 280 Mich App 75.
3. The statute that makes it a misdemeanor for a licensed nursing home or its personnel to physically, mentally, or emotionally abuse, mistreat, or harmfully neglect a patient does not apply to actions taken with respect to the body of a deceased nursing-home patient (MCL 333.21771[1]). *People v Shakur*, 280 Mich App 203.

IMPROPER CONDUCT OF ATTORNEY—*See*

APPEAL 1

INDIAN CHILD WELFARE ACT—*See*

INDIANS 1, 2

INDIANS

INDIAN CHILD WELFARE ACT

1. A parent of an Indian child can withdraw consent to a foster care placement under state law at any time and have the child returned to that parent (25 USC 1913[b]). *Empson-Laviolette v Crago*, 280 Mich App 620.
2. The statute that provides for a stay of guardianship

proceedings when the child's guardian brings a child custody action in the circuit court is preempted by the Indian Child Welfare Act when a parent of an Indian child withdraws consent to guardianship and seeks a return of the child (25 USC 1913[b]; MCL 722.26b[4]). *Empson-Laviolette v Crago*, 280 Mich App 620.

INITIAL CUSTODY DETERMINATION—*See*

PARENT AND CHILD 5

INNOCENT MISREPRESENTATION—*See*

VENDOR AND PURCHASER 2

INSURANCE

DUTIES OF INSURANCE AGENTS

1. An insurance agent whose principal is the insurance company generally owes no duty to advise a potential insured about any insurance coverage, but an event that alters the nature of the relationship between the agent and the insured may produce a special relationship and create a duty to advise the insured in some respect regarding insurance issues, including the adequacy of the coverage; a change in the agent-insured relationship occurs when (1) the agent misrepresents the nature or the extent of the coverage offered or provided, (2) the insured makes an ambiguous request that requires clarification, (3) the insured makes an inquiry that requires advice and the agent gives inaccurate advice, or (4) the agent assumes an additional duty by an express agreement with or a promise to the insured. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16.

NEGLIGENCE

2. The existence of a special relationship between an insurance agent and insured that creates a duty for the agent to advise the insured regarding some insurance issue does not eliminate a claim of comparative negligence associated with or arising from the insured's duty to read the policy and related documents (MCL 600.2957[1], 600.6304). *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16.

NO-FAULT

3. *Berkeypile v Westfield Ins Co*, 280 Mich App 172.

INSURANCE-COVERAGE ISSUES—*See*

EVIDENCE 3

INSURER'S NEGLIGENCE—*See*

JUDGMENTS 1

JUDGMENT NOTWITHSTANDING THE VERDICT—*See*

MOTIONS AND ORDERS 1

JUDGMENTS

DEFAULT JUDGMENTS

1. The negligence of an insurer or its intermediaries should not be presumptively imputed to an insured, procedurally nonnegligent defendant to preclude a finding of good cause and excusable neglect in connection with a motion to set aside a default judgment (MCR 2.603[D][1]). *Shawl v Spence Bros, Inc*, 280 Mich App 213.
2. In determining whether a party has established good cause to justify setting aside a default judgment, the trial court should consider the totality of the circumstances, which may include the following factors: whether the party completely failed to respond or simply missed the deadline to file; if the party simply missed the deadline to file, how long after the deadline the filing occurred; the duration between entry of the default judgment and the filing of the motion to set aside the judgment; whether there was defective process or notice; the circumstances behind the failure to file or file timely; whether the failure was knowing or intentional; the size of the judgment and the amount of costs due under MCR 2.603(D)(4); whether the default judgment results in an ongoing liability; and, if an insurer is involved, whether internal policies of the company were followed (MCR 2.603[D][1]). *Shawl v Spence Bros, Inc*, 280 Mich App 213.
3. In determining whether a defendant has a meritorious defense in connection with a motion to set aside a default judgment, the trial court should consider whether the affidavit contains evidence that the plaintiff cannot prove, or defendant can disprove, an element of the claim or a statutory requirement; a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7), or (8); or the plaintiff's claim rests on evidence that is inadmissible (MCR 2.603[D][1]). *Shawl v Spence Bros, Inc*, 280 Mich App 213.

JUDICIAL OFFICE—*See*

ELECTIONS 1

JURISDICTION—*See*

COURTS 1

PARENT AND CHILD 3, 4

JURY INSTRUCTIONS—*See*

COURTS 2

LIMITATION OF ACTIONS—*See*

NEGLIGENCE 1

LISTED OFFENSES—*See*

CRIMINAL LAW 7, 8

MAGISTRATES—*See*

WORKERS' COMPENSATION 2

MEDICAL MALPRACTICE—*See*

NEGLIGENCE 1, 2, 3, 4

MERITORIOUS DEFENSE—*See*

JUDGMENTS 3

MICHIGAN CAMPAIGN FINANCE ACT—*See*

ELECTIONS 2

MODIFICATION OF CUSTODY ORDERS—*See*

DIVORCE 1

MOTION TO SET ASIDE—*See*

JUDGMENTS 1, 2, 3

MOTIONS AND ORDERS

JUDGMENT NOTWITHSTANDING THE VERDICT

1. A trial court's ruling on a motion for judgment notwithstanding the verdict is reviewed de novo on appeal; the evidence is viewed in the light most favorable to the nonmoving party; if reasonable jurors could honestly have reached different conclusions, the jury verdict must stand. *Guerrero v Smith*, 280 Mich App 647.

NEW TRIAL

2. A trial court presented with a motion for a new trial must determine whether the overwhelming weight of the evidence favors the losing party; on appeal, the trial

court's determination is reviewed for abuse of discretion, but substantial deference is given to the trial court's conclusion that the verdict was not against the great weight of the evidence. *Guerrero v Smith*, 280 Mich App 647.

MUNICIPAL CORPORATIONS

ORDINANCES

1. The Department of Natural Resources is not exempt from local ordinances when establishing public-access boat launches (MCL 324.78114). *Crystal Lake Property Rights Ass'n v Benzie Co*, 280 Mich App 603.

NEGLIGENCE

See, also, INSURANCE 2

MEDICAL MALPRACTICE

1. The amendment of MCL 600.5856 did not alter the fact that the notice requirements of MCL 600.2912b must be met to toll the period of limitations for medical-malpractice actions (MCL 600.2912b; MCL 600.5856[c]). *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309.
2. A medical-malpractice defendant is not obligated to challenge the sufficiency of a plaintiff's notice of intent to sue until the plaintiff has raised the issue of the tolling provision of MCL 600.5856, which necessarily occurs after the defendant has raised the statute of limitations as a defense in its first responsive pleading (MCL 600.2912b). *Miller v Malik*, 280 Mich App 687.
3. A notice of intent to file a medical-malpractice suit must contain, among other things, a statement of the manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice; it is not sufficient to state that the defendant's negligence caused the alleged harm; the plaintiff must describe the manner in which the actions or lack thereof caused the complained-of injury (MCL 600.2912b[4]). *Miller v Malik*, 280 Mich App 687.
4. An insufficient notice of intent to file a medical-malpractice suit does not toll the period of limitations for that suit (MCL 600.2912b, 600.5805[6], 600.5856[a]). *Miller v Malik*, 280 Mich App 687.

TRIAL

5. Attorneys in an action for personal injury may not inject or argue the existence or nonexistence of insurance coverage or other remedies available to the plaintiff. *Guerrero v Smith*, 280 Mich App 647.

NEGLIGENCE OF INSURANCE AGENTS—*See*

INSURANCE 1

NEW TRIAL—*See*

MOTIONS AND ORDERS 2

NO-FAULT—*See*

INSURANCE 3

NOMINATING PETITIONS—*See*

ELECTIONS 1

NOTICES OF INTENT TO FILE SUIT—*See*

NEGLIGENCE 1, 2, 3, 4

NOTICES TO MORTGAGEES—*See*

TAXATION 2

NURSING HOMES—*See*

HEALTH 1, 2, 3

ORDINANCES—*See*

MUNICIPAL CORPORATIONS 1

PARENT AND CHILD

CHILD SUPPORT

1. *Laffin v Laffin*, 280 Mich App 513.
2. *Laffin v Laffin*, 280 Mich App 513.

UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT

3. Whether to exercise jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act is within a trial court's discretion and its determination will not be reversed on appeal absent an abuse of that discretion (MCL 722.1101 *et seq*.). *Nash v Salter*, 280 Mich App 104.

4. A court does not have jurisdiction to make an initial child-custody determination pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act provision regarding significant connection with the state other than mere presence unless the court first establishes that there is no home state for the child or that a court of the home state of the child has declined to exercise jurisdiction (MCL 722.1201[1][b]). *Nash v Salter*, 280 Mich App 104.
5. A Michigan court that made the initial child-custody determination in a divorce proceeding has exclusive, continuing jurisdiction over the child-custody determination where the child and one parent have a significant connection with Michigan; such connection exists where one parent resides in Michigan, maintains a meaningful relationship with the child, and, in maintaining the relationship, exercises parenting time in Michigan (MCL 722.1202[1][a]). *White v Harrison-White*, 280 Mich App 383.

WAIVER OF CHILD'S CLAIMS

6. A parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims of his or her child either before or after such claims arise; exceptions to this common-law rule may be provided by statute. *Woodman v Kera, LLC*, 280 Mich App 125.

PAYMENT OF UNCONTESTED PORTION—*See*

TAXATION 1

PAYROLL-DEDUCTION PLANS—*See*

ELECTIONS 2

PLEADING

SIGNATURE ON PLEADINGS

1. The filing of a signed document that is not well grounded in law subjects the filer to sanctions pursuant to MCR 2.114(E). *Guerrero v Smith*, 280 Mich App 647.

POSSESSION OF CHILD SEXUALLY ABUSIVE MATERIAL—*See*

CRIMINAL LAW 8

PRIOR CONVICTIONS—*See*
CRIMINAL LAW 2

PRIOR REPRESENTATION OF DEFENDANT IN SAME CASE—*See*
CRIMINAL LAW 6

PROSECUTORIAL MISCONDUCT—*See*
CRIMINAL LAW 5

PROSECUTORS—*See*
CRIMINAL LAW 6

PROXIMATE CAUSE—*See*
NEGLIGENCE 3

PUBLIC-ACCESS BOAT LAUNCHES—*See*
MUNICIPAL CORPORATIONS 1

PUBLIC BODIES—*See*
ELECTIONS 2

PUBLIC HEALTH CODE—*See*
HEALTH 1, 2

REAL PROPERTY—*See*
TAXATION 2

REAL PROPERTY TAXES—*See*
TAXATION 3

REDUCTION OF INSURANCE BENEFITS—*See*
INSURANCE 3

REFERENCES TO INSURANCE COVERAGE AND BENEFITS—*See*
NEGLIGENCE 5

REIMBURSEMENT OF COSTS BY CRIMINAL DEFENDANTS—*See*
CRIMINAL LAW 1

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT—*See*

ZONING 1

REMEDIES—*See*

ACTIONS 2

REPORTING REQUIREMENTS—*See*

HEALTH 1, 2

RESIDENTIAL PROPERTY—*See*

VENDOR AND PURCHASER 1

SANCTIONS—*See*

PLEADING 1

SELLER DISCLOSURE ACT—*See*

VENDOR AND PURCHASER 1, 2

SELLER'S DISCLOSURE STATEMENTS—*See*

VENDOR AND PURCHASER 2

SENTENCES

CRIMINAL SEXUAL CONDUCT

1. *People v Wilcox*, 280 Mich App 53.

SEX OFFENDERS REGISTRATION ACT

2. A sentencing court may consider all record evidence when determining whether a defendant must register under the Sex Offenders Registration Act as long as the defendant has the opportunity to challenge relevant factual assertions and any challenged facts are substantiated by a preponderance of the evidence (MCL 28.721 *et seq*.). *People v Althoff*, 280 Mich App 524.

SETTLEMENT NEGOTIATIONS—*See*

EVIDENCE 1

SETTLEMENTS—*See*

INSURANCE 3

SEX OFFENDERS REGISTRATION ACT—*See*

CRIMINAL LAW 7, 8

SENTENCES 2

SIGNATURE ON PLEADINGS—*See*

PLEADING 1

SIGNATURE REQUIREMENTS—*See*

ELECTIONS 1

SIGNIFICANT CONNECTION WITH STATE OTHER THAN MERE PRESENCE—*See*

PARENT AND CHILD 4

SPECIAL RELATIONSHIPS WITH INSURANCE AGENTS—*See*

INSURANCE 1

STANDING—*See*

TAXATION 3

STATUTE OF LIMITATIONS—*See*

NEGLIGENCE 4

STAY OF PROCEEDINGS—*See*

INDIANS 2

SUPPLEMENTAL JURY INSTRUCTIONS—*See*

COURTS 2

TAX ASSESSMENTS—*See*

TAXATION 1

TAX SALES—*See*

TAXATION 2

TAX TRIBUNAL—*See*

TAXATION 1

TAXATION

DEPARTMENT OF TREASURY

1. A taxpayer who is aggrieved by a tax assessment from the Department of Treasury but who does not contest a portion of the assessment must pay the uncontested partial tax liability in full before the taxpayer can invoke the jurisdiction of the Tax Tribunal to hear an appeal of

the contested portion of the assessment (MCL 205.22[1], 205.735). *Toaz v Dep't of Treasury*, 280 Mich App 457.

REAL PROPERTY

2. A mortgagee that obtains a money judgment for denial of due process against a governmental agency that sells the mortgaged property at a tax sale without properly notifying the mortgagee of the forfeiture and foreclosure proceedings is entitled to interest on the judgment pursuant to MCL 600.6455(2), and not at the interest rate of the mortgage. *First Nat'l Bank of Chicago v Dep't of Treasury*, 280 Mich App 571.

REAL PROPERTY TAXES

3. *Walgreen Co v Macomb Twp*, 280 Mich App 58.

TAXATION OF COSTS—*See*

COSTS 2

TRIAL—*See*

NEGLIGENCE 5

UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT—*See*

DIVORCE 1

PARENT AND CHILD 3, 4, 5

UNINSURED-MOTORIST BENEFITS—*See*

INSURANCE 3

VALUATION CHALLENGES—*See*

TAXATION 3

VARIANCES—*See*

ZONING 1

VENDOR AND PURCHASER

RESIDENTIAL PROPERTY

1. The Seller Disclosure Act does not require a transferor to exercise ordinary care to discover defects in the property being transferred (MCL 565.951 *et seq*.). *Roberts v Saffell*, 280 Mich App 397.

SELLER DISCLOSURE ACT

2. A transferor of property may not be held liable under a

theory of innocent misrepresentation with respect to errors, inaccuracies, or omissions in a seller's disclosure statement provided in accordance with the Seller Disclosure Act; innocent misrepresentation is not a viable theory of liability under the Seller Disclosure Act (MCL 565.951 *et seq*.). *Roberts v Saffell*, 280 Mich App 397.

WAIVER OF CHILD'S CLAIM—*See*

PARENT AND CHILD 6

WITHDRAWAL OF CONSENT TO FOSTER CARE PLACEMENT—*See*

INDIANS 1, 2

WORDS AND PHRASES—*See*

HEALTH 1

WORKERS' COMPENSATION 3

WORKERS' COMPENSATION

ALIENS

1. Aliens in the United States who work in the service of another under any contract of hire are employees under the Worker's Disability Compensation Act and are eligible for benefits where they establish a work-related disability that has resulted in wage loss (MCL 418.161[1][*l*], 418.301[4]). *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1.

MAGISTRATES

2. A workers' compensation magistrate who finds that an employer has failed, neglected, or refused to furnish, or cause to be furnished, reasonable medical, surgical, hospital services, medicines, or other treatment to an employee who received a personal injury arising out of and in the course of employment has discretionary authority to award attorney fees to the employee (MCL 418.315[1]). *Harvlie v Jack Post Corp*, 280 Mich App 439.

WORDS AND PHRASES

3. The Worker's Disability Compensation Act defines "disability" as a limitation of an employee's wage-earning capacity in work suitable to his or her qualifications and training from a personal injury or work-related disease; an employee is disabled if he or she suffers an injury

that results in a reduction of that person's maximum reasonable wage-earning ability in work suitable to that person's qualifications and training (MCL 418.301[4]). *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1.

ZONING

VARIANCES

1. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp (On Remand)*, 280 Mich App 449.